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PROSPECTIVE JUDICIAL PRONOUNCEMENTS AND LIMITS TO JUDICIAL LAW-MAKING

Public Prosecutor v Hue An Li [2014] 4 SLR 661 held that the appellate courts have the discretion, in exceptional circumstances, to make prospective pronouncements of law. This article is split into two parts. It first examines several objections that have been made to prospective pronouncements and argues that prospective pronouncements are as arbitrary as ordinary retrospective rulings and do not violate the separation of powers. Prospective pronouncements are also entirely within the ambit of judicial law-making: prospective pronouncements are as prone to error and as undemocratic as retrospective rulings and can be wielded as a tool to reduce the propensity for polycentric effects; and because the Legislature is not necessarily better equipped or better positioned to deal with unfairness flowing from changes in the law. The second part examines how prospective law-making will potentially be applied in the future, with particular emphasis on the differences between civil and criminal cases, the power to precisely tailor civil remedies and criminal punishment, and the interaction between prospectivity and statute.

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I. Introduction

1 The proposition that a court may make prospective pronouncements of law is not new. The acceptability of the proposition has, however, waxed and waned. The Singapore courts recently considered the issue, and firmly came down on the side of permissibility. In *Public Prosecutor v Hue An Li*[1] ("*Hue An Li*"), a specially convened three-judge High Court held that the appellate courts had the discretion, in exceptional circumstances, to make prospective pronouncements of law. Sundaresh Menon CJ, speaking for a unanimous court, considered the issue of prospectivity to be

* The views expressed herein are the author's own and do not reflect those of the Supreme Court of Singapore.

1 [2014] 4 SLR 661.

underpinned by competing policy considerations: on the one hand, retroactivity would incentivise participation in the system of justice and prevent arbitrary outcomes;[2] on the other, prospectivity would accord with the rule of law and give due regard to legitimate expectations.[3] The High Court did not consider objections to prospectivity based on arbitrariness, the separation of powers and the limits of judicial law-making because these were not live issues before it. This article is split into two parts. The first part[4] argues that prospective pronouncements are no more and no less arbitrary than ordinarily retrospective rulings, do not violate the separation of powers and are entirely within the ambit of judicial law-making. The second part[5] analyses how prospectivity may be applied in future cases.

II. Prospective pronouncements are as arbitrary as retrospective rulings

2 As a preliminary point it would be apposite to point out what prospectivity actually entails:

(a) There is some sort of change to the law, or there is a first-time judicial pronouncement that is contrary to what the law was expected to be.

(b) Previously applicable law, or the law as it was expected to be, is applied to the case at hand.

(c) The new propounded law takes effect prospectively from a specified date, normally the date of the release of the judgment.

3 The argument that prospective pronouncements of law are arbitrary is not new. Mishkin, for instance, pointed out that any selection of a definite point in time as the effective date of a new prospective rule seems to involve arbitrariness, in part because it is hard to provide reasoned grounds for selecting one moment rather than another.[6] Judge Traynor wrote that it would be fortuitous for some to be given the benefit of new rules while others are denied the benefit because of arbitrary cut-off dates.[7]

2 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [106]–[107].
3 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [108]–[109].
4 See paras 2–25 below.
5 See paras 26–48 below.
6 Paul J Mishkin, "The Supreme Court 1964 Term" (1965) 79 Harv L Rev 56 at 66, fn 37.
7 Roger J Traynor, "*Quo Vadis*, Prospective Overruling: A Question of Judicial Responsibility" (1976) 28 Hastings LJ 533 at 559.

4 In reality, prospective pronouncements are no less and no more arbitrary than ordinary retrospective decisions. A retrospective decision is simply one that is unbounded by time, and the principles and rules of law propounded within the decision apply to all cases before the courts regardless of when the liability-causing events occurred. However, all decisions are subject to the defences of limitation and *res judicata*. Limitation (and the equitable doctrine of laches) is meant to obviate the dangers of trying a case for which relevant evidence has been lost, either physically or due to failures of memory, and to protect against the uncertainty of potential defendants being left in the limbo of not knowing whether or not they will be sued.[8] *Res judicata* is concerned with finality in litigation and making sure that a party is not vexed twice in the same matter.[9]

5 Both the defences of limitation and *res judicata* implicate weighty policy considerations, but the net result is that a failing litigant or litigant who is out of time is left worse off through no fault of hers if it transpires that she would have been successful had she been able to take advantage of a favourable change in the law. A favourable change in the law is not recognised as one of the exceptions to *res judicata*.[10] A litigant who failed to litigate within the prescribed limitation period, perhaps because she was advised that her claim would fail, would similarly not be able to sue outside the prescribed period by invoking a favourable change in the law. The only litigants who would be able to take advantage of a subsequent favourable change in the law are those who have chosen not to litigate[11] and have a legal cause of action that is not out of time, or an equitable cause of action that is not subject to laches.

6 In this respect retroactive and prospective judicial decisions are, arguably, equally arbitrary; there is no real difference between a prospective pronouncement of law by a court slated to apply from the date of the release of the judgment, and a retrospective decision, whose real reach is only backwards in time by the duration of the applicable limitation period to those who have not litigated.

8 See, *eg*, the preamble to 32 Hen VIII 1540 (c 2), which was the first English Act of Parliament to introduce a limitation period for real property actions.

9 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 32.

10 *Meretz Investments NV v ACP Ltd* [2007] 2 WLR 403 at [218]; fraud and collusion are the only exceptions to cause of action estoppel, while fraud, exception and further material that could not have been adduced with reasonable diligence in earlier proceedings are the only exceptions to issue estoppel.

11 However, those who have chosen to settle out of court could potentially unwind their settlement agreements through restitution, specifically under a mistake of law. This draws yet another invidious line between those who have settled out of court and those who litigated in the courts.

III. Illusory separation of powers objection to prospective pronouncements

7 Prospective pronouncements run up against the objection that the courts are trespassing on hallowed legislative ground. In the context of the US, Black J has said that "prospective lawmaking is the function of Congress rather than of the courts".[12] Similarly, the Saskatchewan Court of Appeal has said that "giving prospective effect to law is endemic to legislatures".[13]

8 It is trite to state that the Legislature has the role of enacting law. It was once thought that the Legislature was the only branch of government that could make law[14] but this no longer holds true. Rubin has convincingly pointed out that many of the laws promulgated by legislatures are directed at administrative agencies,[15] which are in turn delegated the power to make minute and detailed administrative regulations.[16]

9 The Judiciary also has the power to make law. This was not always recognised to be the case. Blackstone was the foremost proponent of the declaratory theory of law. Under this conception, the law was a Platonic ideal that was immanent and unchanging: "decifions [*sic*] of courts of juftice [*sic*] are the evidence of what is the common law".[17] Judges were therefore not making any law and were oracles entrusted with the task of discovering and expounding on what the law was.[18] Declaratory theory, which has been regarded as a fairy tale[19] and has been definitively discarded by apex court decisions, is no longer adhered to.[20]

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12 *James v United States* 366 US 213 at 225 (1961).

13 *Edward v Edward Estate* (1987) 39 DLR (4th) 654 at [30].

14 See, *eg*, Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (1748):

> By virtue of the [legislative power], the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted.

15 Edward L Rubin, "Law and Legislation in the Administrative State" (1989) 89 Colum L Rev 369 at 373.

16 Edward L Rubin, "Law and Legislation in the Administrative State" (1989) 89 Colum L Rev 369, especially at 390–391.

17 William Blackstone, *Commentaries on the Law of England* (Clarendon Press, 1765–1769) at p 71. See also Matthew Hale, *The Theory of the Common Law of England* (H Butterworth, 6th Ed, 1820) at p 90.

18 William Blackstone, *Commentaries on the Law of England* (Clarendon Press, 1765–1769) at p 69.

19 Lord Reid, "The Judge as Law Maker" (1972–1973) 12 J Soc'y Pub Tchrs L 22 at 22.

20 See, *eg*, *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 and *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52.

10 It is true that, descriptively speaking, legislative acts tend to be prospective in nature. However an "ought" cannot be derived from an "is", and with respect to the Saskatchewan Court of Appeal, the fact that prospectivity is "endemic to legislatures" does not lead to the proposition that a court ought not to make prospective law. There are in fact two "oughts" at play here: first, legislatures ought to legislate prospectively; and second, courts ought not to make prospective law.

11 The arguments in favour of legislatures legislating prospectively are well rehearsed and centre on the rule of law. Raz was of the view that laws should be prospective, open and clear in order to be able to guide conduct, and that one cannot be guided by a retroactive law.[21] Fuller opined that a retroactive law is a monstrosity, and to speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose.[22]

12 However, these rule of law arguments are not and cannot be peculiar to legislature-made law. The repugnance of a rule lies not in its source, but in its retroactivity and the consequent failure to guide conduct. By this metric it makes no difference whether the rule is made by the Legislature or the Judiciary. Nonetheless, it could be argued that common law rules are (at least by default) retroactive, and by that measure the common law would be more repugnant than statutory law. Indeed this is not a new refrain. Bentham was extremely scathing of the common law precisely because of its retroactivity, and famously compared judge-made law to a man making a law for his dog: "When your dog does anything you want to break him of, you wait till he does it, and then beat him for it."[23] At this point the second "ought" – that courts ought not to make prospective law – breaks down. The reluctance to depart from retroactivity followed ineluctably from the declaratory theory of law; the abandonment of declaratory theory and the naked admission that judges are indeed making law mean that courts must face afresh the issue of retroactivity in the light of the rule of law.

13 It is illusory to equate the separation of powers with a blanket prohibition on judges making prospective law. The separation of powers deals with the allocation of powers between governmental organs; under the classical view the Legislature makes law, the Executive executes the law and the Judiciary interprets the law. It has already been pointed

21 Joseph Raz, "The Rule of Law and its Virtue" (1977) 93 LQR 195 at 198–199.

22 Lon Fuller, *The Morality of Law* (Yale University Press, 1964) at p 53.

23 Jeremy Bentham, "Truth *versus* Ashhurst; or, Law As It Is, Contrasted with What It Is Said to Be" (1792) in *The Works of Jeremy Bentham* (Edinburgh: William Tait; London: Simpkin, Marshall, 1843) at pp 231–237. See also Friedrich A Hayek, *The Political Ideal of the Rule of Law*, reprinted in *The Collected Works of F A Hayek: Vol XV* (Bruce Caldwell gen ed) (University of Chicago Press, 2014) at p 147.

out that the classical view is too simplistic and cannot countenance the modern state, where the Executive and the Judiciary are also involved in the making of law. That being the case, an allocative doctrine has nothing to say in general about how allocated power ought to be exercised and in particular is not pertinent to the question of whether allocated law-making power can be exercised retroactively or prospectively. Thus, once it is admitted that courts of law are quite legitimately engaged in the business of law-making (separately from the Legislature), the doctrine of the separation of powers *per se* can have no further role to play in delineating the temporal limits on those law-making powers.

IV. Prospective overruling and limits to judicial law-making

14 A related, but subtly different, set of objections relates to the limits to judicial law-making. Under this set of objections, the courts are not strictly speaking assuming a function that properly belongs to the Legislature, but have exceeded the acceptable bounds of judicial power.[24]

15 There remain crucial empirical differences between adjudication in the courts and the passage of legislation in the Legislature, and these differences mean that there ought to be normative limits to the law-making powers of the courts. The first and most obvious difference pertains to the persons involved. Litigation, with rare exceptions, normally entails parties embroiled in real disputes, resorting to courts of law in order to discern who is legally entitled to what. The legal doctrines of *locus standi*, ripeness and mootness ensure that courts do not analyse legal problems *in abstracto*. More fundamentally, the courts cannot initiate proceedings *ex officio* of their own accord. Legislatures do not face the same restrictions, and subject to the constitution (and judicial review) may legislate in any manner on any subject.

16 This leads to the second difference in the outcome of participation. Where proceedings have been validly commenced, a court is generally duty bound to adjudicate on the controversy and come to a conclusion on the respective legal entitlements of the parties. This is straightforward where there is no dispute on the facts or where there are established and uncontroversial precedents applicable. However, parties often litigate because the facts or the law is unclear. A court cannot shirk

24 See, *eg*, J Woodford Howard Jr, "Adjudication Considered as a Process of Conflict Resolution: A Variation on Separation of Powers" (1969) 18 J Pub L 339; Lord Dyson, "The Limits of the Common Law", speech in Singapore Supreme Court (2 September 2014); and Lord Bingham, "The Judge as Lawmaker: An English Perspective" in *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000) at p 25.

behind uncertainties; its power to make law comes to the fore precisely where the law is unclear or where there is a lacuna. Legislatures are not restrained in the same way; participants in the political process, including members of the public at large, are certainly not entitled to any action on the Legislature's part.

17 Third, a participant in the process of litigation expects a certain mode of participation. She would expect to be able to attempt to persuade the court that her legal position is *correct*[25] and to do so through legal arguments and evidential proof. It is possible, if not necessary,[26] for at least some participants to have strongly held beliefs about the correctness of legal decisions and legal reasoning. Arguments abound on whether harm was reasonably foreseeable, a duty of care had existed, if the peculiar kind of damage caused was too remote and so on – and the implicit assumption is that there is a right answer, or at least a range of acceptable right answers. Nobody speaks of the correctness of statutes in the same sense. The debate is over the prudence of the legislative agenda, the extent of popular support, the cost involved and so on, but statutes are not "right" in the same sense that the litigation process is meant to generate the "right" answers. With regard to law-making in the Legislature, a concerned citizen would expect to be able to petition her Member of Parliament or generally engage in civic debate, and this is an entirely different mode of participation.

18 These brute differences between the courts and the Legislature mean that, at first glance, there ought to be normative limits to judicial law-making. The first limit arises from the litigation process, where combat takes the form of, *inter alia*, legal argumentation and the victor is proclaimed to be right. A court must adjudicate and come to a decision, but it is not compelled to rest its decision on principles broader than those immediately applicable to the litigants in particular cases. Parties engaged in litigation would attempt to persuade the court that their arguments are correct. However, distilling the truth from combat presupposes that at least one presented viewpoint coheres with the objectively valid answer or range of answers. All the parties involved in a particular bout of litigation could very well conduct their

25 It is doubtful if legal propositions can be or are true in a fully objective sense, in the way that it is objectively true that there is a chair in the author's office. Many writers hold that, at the very least, legal propositions are true in the conventionalist sense, inasmuch as the law is an interpenetrating set of social conventions: see, *eg*, Jack M Balkin, "The Proliferation of Legal Truth" (2003) 26 Harv J L & Pub Pol'y 5.

26 Coleman points out that it would at least be odd to claim that such-and-such is the law when no judge or lawyer so regards it to be so: Jules L Coleman, "Truth and Objectivity in Law" (1995) 1 *Legal Theory* 33 at 45.

cases on erroneous bases, and in a pure adversarial system a court would be constrained to choose between multiple wrong legal positions. Indeed, Judge Frankel writes that "[e]mployed by interested parties, the [adversarial] process often achieves truth only as a convenience, a byproduct, or an accidental approximation".[27] This is a limit that is easier to articulate than to apply. A court must decide on the basis of at least some principles that are broader than those immediately applicable to the parties if judge-made law is to operate as a coherent whole, rather than as an *ad hoc* collection of decisions. This is also essential if the law is to fulfil its function of providing the facilitative backdrop upon which economic actors bargain. If the law comprises an *ad hoc* collection of decisions limited to their facts with no discernible principles, economic actors would be hard-pressed to determine their default entitlements under the law and bargain in the light of those entitlements.

19 Quite apart from the above, there are two practical reasons why prospective overruling does not run up against the first limit. In the first place, prospective overruling is only resorted to in exceptional circumstances. Litigants would be foolhardy to conduct their cases on the slim chance that the promulgated law would not apply to them. Secondly, litigants in particular cases are quite often directly affected by prospective pronouncements of law. This is especially so where the pronouncements affect the rights and liabilities of a particular class of relationships, or where the litigant is a corporation which would bargain in the shadow of the prospectively pronounced law or engage in similar litigation in the future.[28] For such litigants, the prospect of prospective overruling would not affect how they run their cases because they would be affected by the decision regardless.

20 Secondly, if a legal decision is to have the capability of guiding future conduct, it *ex hypothesi* must have effects on persons similarly situated to the parties. However, by its very nature, the litigation process cannot directly take into account the viewpoints and arguments of all persons who are potentially affected by a judgment.[29] Resort is had to litigation when two or more parties are embroiled in a dispute and seek a legal pronouncement on their respective legal entitlements. The machinery of the courts, fuelled by legal argumentation and being concerned with the rightness or wrongness of legal doctrine as

27 Marvin E Frankel, "The Search for Truth: An Umpireal View" (1975) 123 U Pa L Rev 1031 at 1037.

28 See, *eg*, Marc Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9 Law & Soc'y Rev 95, where the author distinguishes between plaintiffs who only occasionally resort to the courts and repeat plaintiffs who are engaged in many similar litigations over time.

29 Michael D A Freeman, "Standards of Adjudication, Judicial Law-making and Prospective Overruling" (1973) 26(1) CLP 166 at 186.

applicable to the immediate parties, is not equipped to deal with the direct intervention of all who may be potentially affected by the outcome of a lawsuit. This lack of representation would suggest that the courts ought to be cognisant of the effects that a judgment would have on similarly situated litigants. If the decision would involve trade-offs between various social goods and the means to achieve them, or conflicts between various conceptions of the good, this would suggest that the Legislature, comprising democratically elected members, is the organ that is ideally placed to make the call, and not the Judiciary. Nevertheless this difficulty should not be overstated. There is at least some value in litigation settling the position for all similarly situated litigants; certain of their legal entitlements, they would be more likely to settle and avoid incurring litigation costs. If similarly situated persons are of the position that a prior judgment is legally wrong or undesirable in a wider sense, they are always free to challenge it in the courts or petition the Legislature to legislatively overrule it. More fundamentally, the declaratory theory of law has been jettisoned and it has been nakedly admitted that the courts are engaged in law-making. A court cannot help but make law for persons not before it if the doctrine of *stare decisis* is to operate. Cases can only be said to be binding if they are taken to be applicable to future, similarly situated litigants who have not been represented before the court. Harking back to an earlier point, judge-made *law* ought to comprise a coherent and harmonious set of principles and rules of general application. That being the case, and on the assumption that a court is prepared to overrule, it cannot be objectionable for that court to take the further step of overruling prospectively as opposed to the normal course of overruling retrospectively.

21 The third and the most obvious limit comprises polycentric matters. Fuller describes polycentric matters as being analogous to a spider web – a pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole.[30] The defining feature of polycentricity is the unpredictable and complicated effects that potentially follow. Such limits have been recognised in case law.[31] However, this limit is more easily stated than it is to put into practice.

30 Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353 at 394. See also Julius Stone, *Social Dimensions of Law and Justice* (Stevens, 1966) at pp 653–654.

31 *X (minors) v Bedfordshire CC* [1995] 2 AC 633 at 737F–737G. See also *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [98(b)], where Sundaresh Menon JC (as he then was) held that a case would be non-justiciable, *inter alia*:

> … [w]here the decision involves matters of government policy and requires the intricate balancing of various competing policy considerations that judges are ill-equipped to adjudicate because of their limited training, experience and access to materials.

In the first place it would be rare for parties to submit naked polycentric problems wholly unsusceptible to legal reasoning to a judicial tribunal; a plaintiff has to pursue his case in the form of a legal cause of action. More fundamentally it could be said that all legal decisions could potentially have polycentric effects extending beyond the immediate legal rights and obligations of the parties. Fuller himself admits that "[t]here are polycentric elements in almost all problems submitted to adjudication".[32] Therefore the only sure-fire way of avoiding such effects would be for the court to abstain, and for the litigants to resolve their dispute by other means, but this must ultimately be weighed against the duty of the court to adjudicate. A court may, of course, attempt to diminish the polycentric effects of a judgment by adhering to established cases and principles of law. The transmission of downstream effects occurs when new law is declared, or when the law is changed. In as much as rational actors plan their transactions in the backdrop of a correct understanding of what established law is or will be, or on an alternative view a prediction of how a court is going to rule, a judgment that adheres to this understanding or prediction would eliminate the transmission of knock-on effects.

22 At the same time downstream effects cannot be eliminated entirely. These polycentric effects can be mitigated somewhat by adhering to precedent where possible and ensuring the foreseeability of changes to the law. However, as a matter of empirical fact, if the law were completely and utterly predictable, there would be no disputes on what the law is, and litigants would only need to litigate where there are disputes of fact. This is, quite evidently, not true, and disputes which reach the apex courts very often centre on what the law is. It also cannot be assumed that all parties who are potentially affected by a set of legal principles or cases would be equally aware of them. Legal advice is costly and some may be unwilling or unable to obtain legal advice. It also cannot be assumed that persons are perfectly rational: persons may act irrationally on the basis of impulse, intuition or kinship.[33] Most fundamentally, the law cannot be taken to be a static set of rules and principles. Parties often litigate because they seek to persuade a court that the law should be changed retrospectively in their favour, whether due to different social circumstances, analogous changes to other closely related areas of the law, or simply because an earlier court had taken an erroneous view.

32 Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353 at 397.

33 See, *eg*, Louis Baudin, "Irrationality in Economics" (1954) 68(4) *The Quarterly Journal of Economics* 487.

23 Looked at in this manner, prospective overruling can actually be wielded as a weapon for curtailing unpredictable downstream effects. The court applies the law as it then stood to the dispute at hand, and applies new law only from a specified date. If the law as it then stood was sufficiently clear and predictable, downstream effects would be minimised for transactions that were concluded before the specified date. It would be fallacious to assert that prospective overruling cannot be relied upon because it would exacerbate polycentricity and lead to unpredictable and complicated effects. On the contrary, prospective overruling mitigates these unpredictable and complicated effects.

24 The author has established that prospectivity *per se* is not objectionable. One must not make the error of conflating the circumstances calling for prospective overruling with prospectivity *per se*. The circumstances justifying prospective overruling have been variously described by various jurisdictions as involving gravely unfair and disruptive consequences for past transactions,[34] substantial inequitable results,[35] serious injustice[36] and legal chaos.[37] If unfairness, inequity and injustice would result from a judicial change to the law, then the argument could be made that the change ought to be made by the Legislature instead.

25 This of course presupposes that the Legislature is better equipped or better positioned to deal with any unfairness that might ensue from a change in the law. However, this is not necessarily the case. For one, the change in the law could pertain to lawyers' law, or black-letter law, in which case the courts are ideally equipped to devise doctrinal countermeasures to deal with unfairness. Take, for instance, the relatively recent recognition of unjust enrichment as an autonomous cause of action. The courts apprehended the unfairness that would ensue if a recipient is left worse off by a successful claim in unjust enrichment, and devised the defence of change of position to mitigate this unfairness. Secondly, legislatures are majoritarian institutions. If a proposed change to the law is politically unpopular, the Legislature might be unwilling or unable to bear the political cost of changing the law. In contrast, the courts are apolitical institutions which are insulated from majoritarian pressure. Thirdly, the legislative agenda is finite and there are costs involved in forming legislative committees to investigate the prudence and effects of proposed changes to the law. There is simply no guarantee that a Legislature would invest the time and money to do so, especially if the potential beneficiaries of the change are small in

34 *In re Spectrum Plus Ltd* [2005] 2 AC 680 at [40].
35 *Chevron Oil Co v Huson* 404 US 97 (1971).
36 *Lai v Chamberlains* [2007] 2 NZLR 7 at [144].
37 *Reference re Language Rights under s 23 of Manitoba Act, 1870 and s 133 of Constitution Act, 1867* (1985) 19 DLR (4th) 1 at [109].

number or do not organise into pressure groups. Lastly, legislative intervention tends to be definitive. Legislatures, while being able to take cognisance of more matters than courts, are not omniscient and cannot anticipate every single complication that might arise. If a promulgated legislative change needs to be tweaked, there is no guarantee that these tweaks would be made within a short period of time by the Legislature, if at all. Case-by-case adjudication does not have the same degree of conclusiveness. Quite often, a promulgated rule or principle would have unforeseen ramifications that only become evident when subsequent cases come before the courts. Courts are always free to retreat from prior promulgated positions by factually distinguishing prior cases, recognising new defences, otherwise propounding new requirements or exceptions to an established principle, or in a worst-case scenario partially or fully overruling previous decisions and, as this article advocates, overruling prospectively if need be. This strikes a malleable balance between rigidity, for the sake of guidance, and flexibility in order to account for unforeseen consequences.

V. How will prospectivity be applied in Singapore courts?

26 In *Hue An Li*, Menon CJ held that courts may, in exceptional circumstances, restrict the retroactive effect of their pronouncements, having regard to the following factors, with no one factor being preponderant or necessary: (a) the extent to which the law is entrenched; (b) the extent of the change to the law; (c) the extent to which the change is foreseeable; and (d) the extent of reliance on the law.[38] This framework was subsequently applied in two High Court decisions: *Poh Boon Kiat v Public Prosecutor*[39] ("*Poh Boon Kiat*"), where prospective overruling was successfully invoked; and *Ding Si Yang v Public Prosecutor*[40] ("*Ding Si Yang*"), where the court declined to prospectively overrule. *Ding Si Yang* added a gloss: retroactivity would be merited where specific or general deterrence is needed to check the rise of particular types of offences. This is consistent with *Hue An Li*, where the court was at pains to point out that it was not laying down an exhaustive list of factors.

27 There are nonetheless some issues which the courts have yet to address and may come into sharp focus in the future. First, should prospective pronouncements be more readily countenanced for criminal, as opposed to civil, matters? Second, does the power to make prospective law include the power to precisely tailor punishments and

38 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [124]–[125].
39 [2014] 4 SLR 892.
40 [2015] 2 SLR 229.

remedies to reflect the competing interests at stake? Third, can a court make prospective pronouncements where statutory law is implicated?

A. Should prospective pronouncements be more readily countenanced for criminal as opposed to non-criminal matters?

28 *Hue An Li* held that the arguments in favour of prospective overruling cannot be restricted solely to criminal law,[41] but left open the question of whether prospective pronouncements should, as a rule, be more readily countenanced for criminal matters. *Hue An Li* has thus far not been applied to civil matters.

29 One explicitly named factor, namely the extent of reliance on the law concerned, appears to favour the position that prospective pronouncements ought to be more easily countenanced for criminal matters. Indeed, *Hue An Li* points out that this factor is particularly compelling where physical liberty is at stake. From this it would be a short leap to argue that civil matters do not involve life and liberty; they are contests over liability where, ultimately, only money is at stake. It can also be argued that economic actors ought to take into account the risk of adverse changes in the law, and take remedial measures to mitigate this risk by incorporating this into price or taking up insurance. If the law does change, the loss should lie where it falls, and it would be inefficient for a court to intervene (by making a prospective pronouncement), particularly where it cannot be predicted with certainty when a court would intervene.

30 It is submitted that these considerations cannot translate into an ironclad rule. First, despite the fact that life and liberty are at stake, actual reliance on criminal law is not a given. For one, it cannot be assumed that people know the content of criminal law. An empirical study suggests that people do not have knowledge and make guesses by extrapolating from their personal view of whether the act in question ought to be criminalised.[42] Even if people do have knowledge, it cannot be assumed that people rely on that knowledge to rationally decide how to act. People could act out of rage or anger,[43] or be cognitively impaired from the consumption of drugs. Darley points out that it would be unrealistic to expect one under immediate attack to be familiar with the intricacies of the doctrine of self-defence and, even granting familiarity,

41 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [123].

42 John M Darley, Paul H Robinson & Kevin M Carlsmith, "The *Ex Ante* Function of Criminal Law" (2001) 35 Law & Soc'y Rev 165.

43 Sudden provocation is a partial defence to murder: see Exception 1 to s 300 of the Penal Code (Cap 224, 2008 Rev Ed).

to apply the law to the facts in a split second and decide on how to employ defensive force.[44]

31 Second, the extent of reliance is but one factor that is to be taken into account in the *Hue An Li* framework, and other factors could be more telling in a civil context. Take, for instance, the extent of the change to the law. It is at least arguable that judges are more reluctant to institute large-scale change in the criminal context precisely because of the interests at stake (including the fact that criminal law is largely codified in Singapore); and if the changes that do occur tend to be slow and piecemeal, this is a factor that would militate against prospectivity in the criminal sphere.

32 Third, while it is true that life and liberty are typically incommensurate with civil remedies, this is not invariably the case. Civil cases could also result in a loss of liberty. One prime example is an injunction which enjoins a person from taking a prescribed course of action. If the injunction is not adhered to, that person could be committed for contempt of court, which in the worst-case scenario would result in a term of imprisonment. A declaration in civil proceedings that one is the rightful holder of a valid copyright exposes an infringer not just to a lawsuit for damages but also to possible criminal prosecution. Indeed, Cheh notes that the distinction between criminal and civil law is collapsing across a broad front, with injunctions, forfeitures, restitution and civil fines playing large roles in addressing antisocial conduct.[45]

33 Fourth, it would be simplistic to downplay the significance of civil proceedings by reference to the remedy. What is often at stake is not merely who is to pay whom, but why one is liable for damages, and the principle upon which one is to pay another is something that a large number of economic actors could have relied on to enter a large number of transactions. In the House of Lords decision of *In re Spectrum Plus Ltd*,[46] a debenture created a charge "by way of specific charge" over a company's book debts in favour of a bank: under the debenture, the company was to pay the proceeds of any book debt into the company's account with the bank; could not sell, factor, discount or otherwise charge or assign any book debt in favour of any other person without the consent of the bank; and if called on to do so, was to execute legal assignments of such book debts. An earlier case, *Siebe Gorman & Co*

44 Paul H Robinson & John M Darley, "Does Criminal Law Deter? A Behavioural Science Investigation" (2004) 24(2) OxJLS 173 at 181.

45 Mary M Cheh, "Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction" (1991) 42 Hastings LJ 1325.

46 [2005] 2 AC 680.

Ltd v Barclays Bank Ltd[47] ("*Siebe Gorman*"), had held that such debentures created valid fixed charges. The House of Lords overruled *Siebe Gorman*, preferring substance over form and concluding that such a debenture, unaccompanied by any restrictions on how the chargor could spend the money in the account, only created a floating charge. This caused considerable disquiet,[48] with Young pointing out that banks and borrowers had for 25 years organised their affairs on the understanding that a fixed charge was created.[49]

34 A court should therefore be chary of proclaiming that prospectivity would be more easily countenanced in one area of the law or another.

B. Precisely tailored punishments and remedies?

35 In *Hue An Li*, the court, in analysing the sentence to be meted out, prospectively overruled *Public Prosecutor v Gan Lim Soon*[50] ("*Gan Lim Soon*"), but retrospectively overruled *Public Prosecutor v Ng Jui Chuan*[51] ("*Ng Jui Chuan*"). *Gan Lim Soon* stood for the proposition that a fine would be sufficient in most cases of causing death by negligent driving while *Ng Jui Chuan* stood for the proposition that rashness is only made out if the offender knew that the risk he was taking would in all likelihood occur. Taking both lines into account, the eponymous Hue was imprisoned for four weeks – shorter than what the sentence would have been were *Gan Lim Soon* retrospectively overruled, but at the same time longer than what it would have been were *Ng Jui Chuan* prospectively overruled.

36 At the very least, *Hue An Li* stands for the proposition that where two or more disparate legal propositions are to be taken into account for sentencing, a court is not obligated to take an all-or-nothing approach. A court may retrospectively overrule one legal proposition and prospectively overrule another, and is not obligated to wholly apply the law as it stood or will stand at a particular date. It is telling that *Hue An Li*, in promulgating a framework of factors to be taken into account, referred to "law or legal principle".[52]

47 [1979] 2 Lloyd's Rep 142.
48 See, *eg*, Geoffrey Yeowart, "Why Spectrum Plus is Bad News for Banks" (2005) 24 Int'l Fin L Rev 19.
49 Jessica Young, "Charge over Book Debts – The Question of Control" (2004) 34 HKLJ 227 at 236.
50 [1993] 2 SLR(R) 67.
51 [2011] SGHC 90.
52 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [124].

37 *Hue An Li* can also be taken to stand for the wider proposition that a court may come to a compromise between retrospectivity and prospectivity and give partial retrospective effect to a change in the law. Criminal sentencing involves the exercise of a large ambit of discretion. While the same principles must be applied, no two cases are identical. Punishment must fit the man and the crime; a court must weigh the four classical principles of retribution, deterrence, prevention and rehabilitation, alongside any extant aggravating or mitigating factors in determining the appropriate sentence. From this it is but a short leap to reason that a court has the power to partially retroactively apply a change in sentencing law. Quite apart from principle, this is affirmed by the outcome of *Hue An Li*, where the imprisonment term of four weeks was in effect a compromise between full retrospectivity and full prospectivity. To illustrate: a court may pay heed to reliance on an entrenched principle of law that is to be changed and yet place some weight on other factors militating against full prospectivity; the term of imprisonment would be somewhere between the sentence that would have been passed before the decision and the sentence that would apply from the date of decision or some other future date.

38 *Hue An Li* raises the possibility that a court may do the same with respect to civil remedies. However, it is difficult to see how this may be achieved. Criminal sentencing is a discretionary exercise which allows (within statutory limits) the precise calibration of the type and extent of punishment. This is generally not the case for civil remedies. Damages are:[53]

> … the prime remedy in actions for breach of contract and tort. They have been defined as 'the pecuniary compensation obtained by success in an action for a wrong which is either a tort or a breach of contract'.

Damages for breach of contract or tort can only be reduced or refused on certain enumerated doctrinal grounds – for instance, a failure to mitigate, a lack of causation or damages being too remote. These doctrines do not admit of the same ambit of discretion endemic to criminal sentencing and do not allow a court to directly take into account factors for or against prospectivity.[54] Furthermore, damages, being in general compensatory in nature, aim to put the plaintiff in the position that she would be in had the breach not taken place. The restoration of the *status quo ante* would exclude, or at least be difficult to

53 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1070E.

54 This is not to say that the mentioned doctrines themselves cannot be prospectively overruled or new doctrines prospectively pronounced. However, that operates on the level of the principles to be applied in determining whether damages ought to be awarded or the quantum thereof, and not directly as a matter of discretion in determining the same.

reconcile with, any discretion on the part of the court to grant a partial award of damages.

39 The position is *a fortiori* for non-monetary remedies, which are either granted or not granted. Where an injunction is concerned, a person is either ordered to refrain from doing something (or mandated to do something) or he is not. Similarly a person is either compelled to specifically perform a contract (or severable contractual obligation) or he is not. It would be absurd for one to be restrained from publishing only half of a defamatory statement, or one to be ordered to specifically perform a contract for the sale and purchase of land by transferring only half of the land involved.

40 In summary, a court is free to precisely tailor criminal sentences and, *de facto* if not *de jure*, compromise between retroactivity and prospectivity; but the same cannot be done where civil remedies are at stake. An all-or-nothing approach must be taken because, as a matter of doctrine, a court cannot take directly into account factors for or against prospectivity in determining the civil remedy to award; and because civil remedies cannot or should not be partially awarded.

C. Statutes and prospectivity

41 In *Poh Boon Kiat*, Menon CJ doubted that it would have been open to the court not to impose a custodial sentence if, on a true interpretation of the statute involved, a custodial sentence was mandatory, but left the issue at that because the custodial threshold was crossed in any case.[55]

42 Acts of Parliament are hierarchically superior to the common law. The amenability of statute law to prospectivity therefore turns on statutory interpretation – more specifically, whether the statute excludes or ousts prospectivity. Section 9A of the Interpretation Act[56] mandates a purposive interpretation of written law. Therefore the ultimate question is whether Parliament intended to exclude or oust a court from prospectively applying the law.

43 This question may be answered differently depending on the exact statute involved; nonetheless, there are some propositions which may be safely asserted. First, acts of Parliament, simply by virtue of being validly promulgated, have clearly defined operative dates. Singaporean statutes are effective upon presidential assent; and it is eminently within Parliament's powers to expressly modify this default

55 *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892 at [114].
56 Cap 1, 1997 Rev Ed.

position through the use of transitional provisions. A court making a virgin pronouncement on a recently passed statute should, therefore, ordinarily adhere to this effective date; a failure to do so would violate the separation of powers and be tantamount to usurpation of parliamentary power.[57] However, this is not necessarily the case where there is a change to a settled interpretation of a statute. Prospectively overruling an earlier judicial decision (or settled understanding) does not, strictly speaking, contradict the effective date of a statute. Parliament must be taken to intend a statutory provision to be operative from the date of presidential assent (or another stipulated date), but this is neither here nor there when it comes to a departure from a prior interpretation of that provision. There is in fact Singapore precedent for this. In the Court of Appeal decision of *Abdul Nasir bin Amer Hamsah v Public Prosecutor*[58] ("*Abdul Nasir*"), cited in *Hue An Li*,[59] the appellant was sentenced to life imprisonment for kidnapping. The prevailing practice then was to treat a sentence of life imprisonment as equivalent to 20 years' imprisonment. Yong Pung How CJ held that life imprisonment should be understood as imprisonment for the whole of a person's natural life; but this holding was only to take prospective effect from the date of the decision and did not apply to the appellant. On the authority of *Abdul Nasir*, Parliament cannot be taken to have foreclosed the possibility that a first-time pronouncement on a statutory provision would only be given prospective effect (that differs from the date of promulgation) if that pronouncement conflicts with a settled understanding of that provision. The position is surely *a fortiori* where a court is overruling a previous judicial decision. Indeed, this was precisely what *Hue An Li* did in overruling *Gan Lim Soon* and prospectively holding that a custodial sentence would be warranted for a *statutory* offence.

44 Second, for cases which alter a settled understanding, the adoption of a purposive approach for statutory interpretation *per se* is unlikely to be conclusive one way or the other. While prospectivity is not exactly new, *Hue An Li* was the first case in the Singaporean context to systematically codify a framework and explicitly hold that it was prospectively pronouncing on the law. Before *Hue An Li* it would have been unlikely for parliamentarians to have applied their minds *ex ante* to whether the courts should have the power to prospectively pronounce on a change to a settled understanding. As has already been argued in the article, *ex post* legislative acquiescence to a prior settled

57 See, *eg*, *Au Wai Pang v Attorney-General* [2015] SGCA 61 at [29] and *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [77].

58 [1997] 2 SLR(R) 842.

59 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [122].

understanding does not foreclose a court from altering that settled understanding.[60]

45 Third, there are some statutes upon which prospective pronouncements by the Judiciary are completely out of the question. Statutes which are promulgated with a clear intention to overrule the common law fall within this class. Such statutes, by definition, involve a change to the law, and Parliament must be taken to have considered the impact the change would have. If transitional provisions are present, they must be adhered to, and where absent, the courts must apply the statute from the date of valid promulgation. There is simply no room for the courts to prospectively apply a statute overruling the common law, for doing so would be tantamount to the courts substituting the operative date of the statute with another date of the court's choosing. A clear-cut example would be Art 149(3) of the Constitution of the Republic of Singapore[61] and s 8B of the Internal Security Act,[62] which were passed with the clear intention to overrule *Chng Suan Tse v Minister for Home Affairs*[63] and reinstate *Lee Mau Seng v Minister of Home Affairs*[64] as the law with respect to the judicial review of detentions under the Internal Security Act. Whether Parliament did pass a statute for the purpose of overruling the common law is, of course, a question that must be resolved on a case-by-case basis.

46 To conclude, there is no absolute bar on prospectivity *vis-à-vis* statutory law. Nonetheless, there remains an added layer of complexity, and it is incumbent on a court to consider if the statutory scheme at hand countenances judicial prospectivity. All things being equal, a court ought to be more willing to prospectively overrule a prior settled interpretation of a statute, particularly where a prior judicial decision is implicated.

VI. Conclusion

47 The reluctance to countenance prospective law-making in the courts is an accident of history and a relic of outmoded views on judicial law-making and the separation of powers. Once it is admitted that the courts are in the business of making *law*, one can no longer hide behind myths to justify abstention. This article argues that a blanket prohibition on prospective law-making cannot be justified, and that *Hue An Li* was correct in countenancing prospective law-making. Prospective

60 At para 26 above.
61 1985 Rev Ed, 1999 Reprint.
62 Cap 143, 1985 Rev Ed.
63 [1988] 2 SLR(R) 525.
64 [1971–1973] SLR(R) 135.

law-making is not arbitrary, does not violate the separation of powers and does not run up against the limits of judicial law-making. In particular it cannot be assumed that legislatures are better equipped to act as agents of change. Most fundamentally of all, judges should not be restrained from doing justice, and if doing so requires a prospective pronouncement of law, bold spirits should prevail.[65]

48 This is not to say that prospectivity is a silver bullet that is readily applicable to the full gamut of cases. There should not be an ironclad rule that prospectivity is more easily countenanced for criminal, as opposed to civil, matters; but while a court can precisely tailor a criminal sentence to reflect a compromise between full prospectivity and full retroactivity, this is not possible where civil remedies are concerned. And where statutory law is implicated, the courts must be mindful of the cardinal separation of powers between the Judiciary and the rest of the State. This does not admit of a clear answer: some statutes, particularly those with a clear intention of overruling the common law, completely exclude prospectivity; at the same time there is clear precedent of a court prospectively correcting a widely held, albeit erroneous, interpretation of a statutory provision. Time will tell how the courts will exercise the power to prospectively make and alter law.

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65 "Bold spirits" is borrowed from Denning LJ (as he then was) in *Candler v Crane, Christmas and Co* [1951] 2 KB 164 at 178.