THE CONCEPT OF RETROACTIVITY:

Its variations in the different branches of law.

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THE concept of retroactivity has a deceptively theoretical content. The most irresistible temptation is to treat it as merely designating a particular mode of operation of the legal norm, i.e. the process whereby such norm can be made to apply to *past* situations, which are properly regulated by earlier norms dealing with the same subject-matter. This outlook, in its insistence on limiting a theory of retroactivity to a study of the relation between static, consecutive norms within a legal system, with reference merely to a given juridical situation or fact, tends to overlook the truth that the real core of the theory is NOT the legal system, but LAW ITSELF, viewed as a dynamic structure which is capable of determining the course of social and economic progress within society. The purely theoretical content is reflected in the analogy drawn by Savigny, according to which retroactivity explores the juridical line of communication between two consecutive laws, just as private international law explores the points of intersection between contemporaneous legal systems. But, such an approach is insufficient: it still needs to be complemented by the sociological and personal background, which animates the concept under analysis. Indeed, the very *raison d'être* of a theory of retroactivity is to ensure a smooth evolution of social progress, free from any 'juridical leaps' that could impair rights acquired under old laws, enacted by the proper state-organ or authority. This implies that the underlying principles of a general theory of retroactivity are:

(i) Laws introducing brand-new institutions, as The Emergency Labour Corps Act (1972), are excluded by the theory because they stand in no special relation to the past.

(ii) Laws effecting substantial reforms in existing institutions should, as far as possible, avoid impairing rights acquired under the old law.

(iii) Laws which abolish completely existing institutions or rights should, as Gabba rightly maintains, operate only for the future, thus leaving intact the rights or institutions validly constituted under the old law. This refutes the theory of retroactive operation of so-called prohibitive laws, proposed by Lasalle.

The above 3 principles show that the theory of retroactivity *naturally*, and paradoxically at the same time, approves of the Latin maxim *lex non habet oculos retro*. Indeed, some writers, among them Clementine and de la Grassaye, have exalted this principle of non-retroactivity of law to the status of a *Grundnorm*, which unifies all fields of law, whether private or public. Even some modern codes have found it convenient to insert an article providing for the non-retroactive operation of law in general. In Italy, for example, Section II of the Preliminary Title to the Civil Code provides:

'La legge non dispone che per l'avvenire: essa non ha effetto retroattivo.'

Attempts have been made before the Italian Constitutional Court to attribute a constitutional significance to this provision. But, the said Court has repeatedly declared that no law can be declared invalid on the grounds that it contravenes Section II, for the principle of non-retroactivity has received constitutional protection only in the criminal law field. Along these lines, the Italian Court of Appeal on the 7th May, 1966, argued as follows:

'La irretroattività delle leggi è costituzionalmente garantita con esclusivo riferimento alle norme penali e non anche alle norme civili, amministrattive e tributarie, rispetto alle quali, l'irretroattività non è stabilita in modo vincolante, neanche dall'art. 11 poichè questa disposizione, avendo valore di legge ordinaria, può essere derogata da altra norma di pari efficacia.'

What, therefore, is the legal force of Section II? A number of Italian judgments in the 1960s concur in the view that the principle of non-retroactivity of laws, with the exception of criminal law, is merely 'un principio generale del (nostro) ordinamento giuridico'; and therefore, 'il legislatore conserva piena facoltà di derogarvi quando eccezionalmente lo ritenga opportuno. Accordingly Section II prescribes merely a rule of construction, to be followed by the Court, when no transitory provision exists in a repealing or amending Act. The same situation prevails in France, in virtue of the identical provision contained in Section2 of the Preliminary Title to the Civil Code.

In Malta, the general provision relating to retroactivity is con-

tained in section 12 of the Interpretation Act of 1975. It is more detailed than the sweeping article of the two said Codes, but its sphere of application is equally far-reaching and permeates into all fields of law. In sub-section (1), which deals with *Repealing Acts passed after commencement of the 1975 Act*, it enunciates, and unlike the French and Italian provision, even gives substance to the principle of non-retroactivity, by making it binding upon Maltese Courts to apply the doctrine of vested rights, whenever no transitory provision exists in a legal instrument. Accordingly it provides that the said Acts shall not – unless the contrary intention appears:

... (b) affect the previous operation of any enactment so repealed, or anything duly done or suffered under any law so repealed.

(c) affect any right, privilege, or liability acquired, or accrued, or incurred under any law so repealed.

The same principle is made to apply to *Amending Acts*, irrespective of the date when passed, by sub-section (2). The word 'Acts' used in Sub-Sections prima facie limits its application to laws enacted by Parliament. This, however, is not the case, for section 2 provides that 'Act' as used in the 1975 law itself includes any instrument having the force of law, excepting only such instruments as may be subject to the provisions of the Interpretation Act 1889, passed by the U.K. Parliament, e.g. the 1964 Constitution. Accordingly, subject to this exception, the doctrine of vested rights *must* be applied by our Courts even when the repealing or amending instrument is some particular type of subsidiary legislation. Another important feature of the Interpretation Act is that it distinguishes between a repealing and an amending Act from a purely theoretical angle, and not from the point of view of their effects. This is implied from the definition of 'amendment', given in sub-section (3) of section 12, which includes also substitution and replacement. Bearing in mind that the latter two processes can effect the prohibition of certain rights or institutions, it can be stated that *abolition, as opposed to mere reform of existing rights, does not really characterize the notion of repeal under section 12 of the 1975 law. What really distinguishes repeal from amendment is the fact that the legislator has decided to efface a legal norm without inserting a new one in its place.* Such an approach is definitely recommendable because it provides a criterion which is absolute, and is, of its very legal nature, easily discernible.

Having examined the approach adopted by our Interpretation

Act in the field of retroactivity, it is worthwhile to examine whether section 12 does in fact succeed in achieving some constitutive effect or in eliminating some of the vagueness surrounding the theories of retroactivity, previously relied upon by Maltese Courts, i.e. the theory of Gabba and Pacifici Mazzoni. Any idea that section 12 is binding on the legislator until he decides to repeal it is untenable. The phrase 'until the contrary intention appears' implies that the legislator is still free to insert a transitory provision which is in complete defiance of the doctrine of vested rights. The fact acknowledged by the Civil Court, in *Azzopardi Zammit vs Formosa* (1931) that 'la giurisprudenza ha sempre riconosciuto questa facoltà nel legislatore di rendere retroattiva una legge indipendentemente del fatto che tale legge lederebbe diritti quesiti' is still juridically valid. Moreover, the principle that, in absence of an express provision prescribing retroactivity, operation for the future is to be presumed, had been repeatedly asserted by our Courts. Accordingly, in *Mizzi vs Farrell* (1945), the Court of Appeal annulled a Rent-Board's decision on the grounds that the said Board had applied retroactively a law regulating increase of rent. It explained that 'ma hemmx fl-Ordinanza 16 tal-1944 l-ebda dispożizzjoni li tagħti lill-istess Ordinanza forza retroattiva; u għalhekk hija ma tistax tiġi applikata ħlief għal żmien wara d-data tal-promulgazzjoni tagħha.' Indeed, neither does section 12 resolve any problem concerning the application of the doctrine of non-retroactivity, for the Courts will still find difficulty in determining the point at which a 'right, privilege or liability' has been 'acquired, accrued, or incurred' under the repealed law. Indeed, far from subverting the present state of law, section 12 may be said to constitute mere formulation of the judicial trend that has till now prevailed in Malta.

The doctrine of vested rights, as expounded by Gabba, therefore, still retains its former juridical importance. As a starting point of his definition of a vested right or 'diritto acquisito', he criticizes the definitions brought forward by other jurists in determining which elements to include within his own definition. The elements he arrives at are the following:

(i) Vested rights must have entered the '*patrimonio*' (property) of the subject. This idea he borrowed from Meyer, who defined them as 'diritti che diventarono proprietà di colui che li esercita, cosicchè costui può goderne e disporne nel modo più assoluto.' Similarly Merlin had said that vested rights are 'quelli che sono entrati nel nostro dominio'. Savigny, too, maintained that such rights 'costituiscono un oggetto della signoria individuale'. All

these interchangeable terms mean to establish the truth that a vested right is one which, at the moment of its acquisition, enters within the patrimony of the acquiring subject. Accordingly, not all the rights possessed by an individual are vested rights, e.g. rights of capacity are not rights in the proper sense, because they lack the element of enforceability; there is no person against whom I can enforce my right of citizenship. If the State refuses to recognize me as citizen in its law, I must remain without my legal remedy.

(ii) Vested rights must necessarily be differentiated from the so-called 'diritti consumati'. This idea Gabba took over from Reinhardt's and Spangenburg's definitions, themselves improved upon by Savigny who said that a vested right 'è ogni diritto fondato su di un fatto giuridico accaduto *ma che non venne ancora fatto valere*.' A consummated right, therefore, is one which has not only gained access into the 'patrimonio' of the individual, but has actually become at one with it, thus making it impossible for any new law, *even if made expressly retroactive by the legislator*, to be applicable in its regard. Gabba maintains that these rights can be either those sealed by an inappealable Court judgement or by compromise.

(iii) Vested rights are not necessarily created voluntarily by the individual; they may also accrue to the individual, by operation of the law. Bearing in mind these three elements, Gabba formulates the following definition: '*È acquisito ogni diritto che (a) è consequenza di un fatto idoneo a produrlo, in virtù della legge del tempo in cui il fatto venne compiuto, benchè l'occasione di farlo valere non siasi presentata prima dell'attuazione di una legge nuova intorno al medesimo e che (b) a termini della legge sotto l'impero della quale accade il fatto da cui trae origine, entrò immediatamente a far parte del patrimonio di chi lo ha acquistato*.' Accordingly, the acquisition of a vested right is marked by the point of intersection between a juridical situation and the law which regulates it. 'La dottrina del diritto quesito,' says Gabba, 'è in sostanza il risultato di una sintesi dei principi concernanti ciascuno dei suoi due elementi componenti che sono: il diritto obiettivamente considerato, e il fatto acquisitivo che trasforma quello da obiettivo in subiettivo o individuale.' A legal norm, on its own, therefore, cannot be productive of a vested right. It is only when the juridical situation contemplated by it comes into existence, that it acts upon the said norm and in accordance with it produces a vested right in the individual. It is precisely this element of bilateralism that characterizes the notion of a vested

right, and gives rise to the *four requisites, which a juridical fact must satisfy before it can act through the legal norm to convert it into a concrete, vested, and individual right:*

(1) The fact capable of grounding acquisition must have been fully accomplished in terms of law. Thus, if the period of acquisitive prescription is of 30 years, and on the date of commencement of a new law increasing the said period, it is still in its 28th year, it cannot be claimed that ownership has been acquired. On the other hand, if the 30 years have elapsed before the commencement of the new Act, the new prescriptive period cannot apply, for the acquisitive fact has been fully accomplished.

(2) The fact allegedly grounding the acquisition of a vested right must be posterior to, or at least contemporaneous with, the law in virtue of which such right is generated.

(3) The parties must have the required legal capacity.

(4) And they must have observed all the formalities prescribed by law.

The *first* requisite, relating to the *fait accompli* gives rise to many legal difficulties. Accordingly, bearing in mind the truth that some juridical transactions can only be accomplished in separate stages, as a contract which requires a proposal and an acceptance, Gabba determines the three cases in which we can really say that such a transaction qualifies as a *fait accompli, even though there is some fact which still needs to occur:*

(i) When it is certain that such fact will happen. E.g. I promise to give B £M10 on Monday. B acquires the right to enforce my promise before the day on which payment is due.

(ii) When the fact is uncertain, but forms a suspensive condition of the transaction. E.g. I promise to lend B £M1000 within 2 years, if by then my business profits will have exceeded £M5000. If a new law on contracts is passed during the course of those two years, it cannot impair B's right to enforce my promise, when the condition comes true. 'I diritti condizionali' (whether contractual or testamentary), says Gabba, 'posti in essere vigendo una legge anteriore, non possono mai trovare ostacolo all'effettuazione loro nella legge nuova sotto il cui impero la condizione si avveri.' This principle has been expounded by our Courts, outside the context of transitory law, in *Cilia vs Farrugia*. In that case, the tenements occupied by plaintiff and defendant had a common well. Defendant, however, had promised plaintiff to block the well as soon as he would become owner. The Court, relying on the principle that 'l-adempiment tal-kondizzjoni għandu effett retroattiv

għall-epoka meta jkun sar il-kuntratt,' held that once the plaintiff did become owner, he was bound to fulfil his obligation, in accordance with the terms agreed upon at the moment of conclusion of the contract.

(iii) When the missing fact constitutes a mere evolution of the vested right in which it is rooted. E.g. the right of action. Outside these three hypotheses, the juridical transaction cannot be productive of a vested right; it is still a '*fatto acquisitivo incompleto*', which gives rise to mere '*aspettative*' or expectations of true rights. E.g. the expectation of a person who is in the course of acquiring through prescription.

An important feature of Gabba's doctrine is the three-graded hierarchy which envisages these categories of rights: (i) consummated rights; (ii) vested rights and (iii) the so-called *facoltà di legge*, which are mere pseudo-rights, incapable, by their own nature, of gaining access to the juridical notion of 'diritto acquisito'.

While dealing with the notion of facoltà, Gabba points out that, having regard to the facultative element virtually characterizing all rights, it is only with great difficulty that a juridical distinction between 'facoltà' and 'diritto acquisito' can be fomulated. Indeed, there exists no substantial distinction between them; the only difference being that 'facoltà' mark the point of origin of vested rights: most vested rights have, at some point prior to their acquisition, subsisted in the form of a faculty conferred by law. 'Le facoltà non possono venir contrapposte ai veri e propri diritti, se non intendendole anteriori ai medesimi ... *Codestà anteriorità ad ogni e qualsi voglia diritto è il solo criterio sicuro e assoluto onde contraddistinguere le facoltà dai diritti quesiti.* The *facoltà*, therefore, always precedes the vested right. It is only when the individual actually utilizes such faculty that he *ipso facto* converts it into a vested right, and forestalls the operation of a new law in his regard. *Until* he does utilize it, however, any new law can take it away from him; and he has no grounds upon which to raise any complaint. E.g. If a new law is to the effect that persons formerly capable of making a will are now rendered incapable, no one of them, who has not made a will under the old law, can claim the capacity taken away from him; on the other hand, wills validly made under the old law remain valid.

Another distinguishing feature of a 'facoltà' is that, in virtue of equity, the mere commencement of its execution suffices to effect the conversion into a vested right. This principle, however, must be applied with moderation, having regard always to the acuteness

of the individual benefit derived from the alleged vested right. E.g. A new law which abolishes divorce should not be allowed to affect pending divorce proceedings.

A third feature relates to the process whereby the attribute of 'facoltà' is denied to all those faculties arising out of true vested rights, e.g. the faculties which accrue to the parties in virtue of a contract between them. In such cases, the faculties are deemed to be juridically unified with the vested right from which they flow, i.e. they are true vested rights.

The application of the distinction between a faculty and a vested right is occasionally subject to juridical controversy. The right of action, for example, has been treated by writers like Weber as a mere faculty which can be taken away retroactively by a new law, provided it has not been exercised. Gabba, however, rightly enough, recognizes the dependance of a vested right upon the action which protects it, and maintains *that actions which protect vested rights are themselves, in virtue of that fact, vested rights* which cannot be removed by a new law. Accordingly, if I have a right of action under a particular law, I can utilize such right even *after* its abrogation, provided the causes of action arose before such abrogation. This was the line followed by English Courts in the *Smithies and National Association of Operative Plasterers case* (1909), where they declared that section 4 of the Trade Disputes Act, which granted immunity to specified trade unions, was *not* retrospective. Therefore, since the causes of action against the Association, itself a registered trade union, had arisen before the commencement of the said Act, the action had to be maintained. It is also the line followed by section 12 of the 1975 Interpretation Act, which provides that a repealing Act shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as has been acquired, accrued, or incurred under the repealed law. Moreover, 'any such investigation, legal proceeding or remedy may be *instituted*, continued or enforced.' This shows that under our law a right of action is a vested right, and is enforceable even *after* the abrogation of the law which grants it. The doubt which arises is whether our Courts will apply the above provision to ALL actions, or as Gabba maintains, only to actions which protect vested rights and not mere faculties. The answer lies in the interpretation which the Courts will give to the words (12(1)(c)) 'any right privilege or liability acquired, accrued, or incurred under the repealed law'. If they will accept Gabba's doctrine that, say, rights of capacity, rights regulating

status, and perpetual rights are mere faculties, *not* falling under sub-paragraph (c), they will also have to accept that actions protecting such rights, as actions for disavowal, are also faculties and the principle of non-retroactivity does not apply in their regard. A second doubt arises, in the case of *amending* Acts, in respect of which, there exists no provision similar to sub-paragraph (c) of sub-section (1), relating to legal proceedings. Does the absence of such a provision mean to imply that when a right of action is lost in virtue of an amending act, it is not enforceable, after the commencement of the said Act, even in respect of causes of action arising before commencement? The issue will eventually depend on Court interpretation.

It is now possible to apply the doctrine of vested rights to civil relations. The law of persons will serve as an appropriate and intriguing starting-point. Most of the legal norms in this field of law are concerned with the regulation of personal status, whether viewed from the point of view of the family, as legitimacy, illegitimacy, paternity, adoption, or from the point of view of society, as citizenship, tutorship, curatorship. Gabba maintains that all such 'rights' fall under the category of 'facoltà', and once the legislator takes them away or reforms them, no person who has not made use of them under the old law can claim them back. E.g. If a new law provides that nationals of State X cannot become citizens of Malta, none of the said nationals who has *not* acquired citizenship under the old law can allege violation of a vested right. This example shows that the *raison d'être* of the principle of retroactivity of laws regulating status is that status is creative of durable effects, in respect of which the State reserve its right to legislate. To expect that State legislation on citizenship or marriage will apply only to persons who have not yet acquired citizenship or entered into matrimony would be to discard all considerations of smooth evolution of social progress. Even the individual cannot legitimately expect that his citizenship and matrimonial rights will remain unaltered. Indeed, all rights accruing from status are of their own nature elementary, or to use Gabba's term – '*fondamentali*' – *because they represent the sine qua non conditions which must be fulfilled before all other rights can be acquired.* And 'queste condizioni o premesse fondamentali dei veri diritti', says the same author, 'sono date dalla civile convenienza e dalla legge che la governa, e per natura loro, devono restare in potere della società e della legge senza mai diventare diritti quesiti, inviolabili dell'individuo.' This, however, does *not* mean that there exist no vested rights in the field of personal

status: the basic principle which is in force declares that *once a status which is favourable to the individual has been acquired, e.g. legitimacy, it cannot be lost, in virtue of a new law.* This principle applies also to the status of husband and wife created through the contract of marriage; to citizenship acquired by reason of place of birth, through registration, or automatically in the circumstances required by law; and to the status of a legitimated, adopted or acknowledged child or of a legally separated spouse.

In so far as each of the above conditions are favourable to the individual they cannot be terminated by a new law. *Acquisition of status must be exclusively governed by the law which is in force when the acquisition is perfected.* This can be translated in the following three rules:

(i) *A law introducing new grounds of loss of status should never be construed retrospectively.* But if the cause of the new grounds is of a permanent nature, it gets caught by the new law, under which it continues to subsist. Therefore, if a law enacts that all nationals of State X must lose their citizenship, it should receive immediate application, and the said nationals lose their citizenship.

(ii) *The formalities of the juridical act constituting the acquisition of a new status must be regulated by the law in force at the time of acquisition.* A law dealing with the formalities for marriage can never apply to marriages celebrated before its commencement.

(iii) *The validity or invalidity of the acquisition of status must be judged in terms of the law in force at the moment of the acquisition.* Accordingly, the validity of a marriage ought always to be regulated by the law in force at the time of its celebration. A marriage should not become null, as a result of the commencement of a new law, nor should a marriage, invalid when celebrated, become automatically valid in virtue of a new law which takes away certain grounds of nullity allowed under the old law. This principle has unfortunately been drastically violated by the Maltese Marriage Act of 1975, which applies the section relating to nullity to all marriages whether contracted before or after the commencement of the Marriage Act, including marriages in respect of which nullity proceedings were still pending, on the date of commencement, before the Ecclesiastical Courts. Only a judgment having effect as *res judicata* on or before July 15th, 1975, continued to be operative. Under our law, therefore, the action for annulment of marriage is deemed to be a mere faculty, that can be taken away by a new law. It does not even make Gabba's equitable conces-

sion, regarding the commencement of execution of the 'facoltà' because the 1975 law is made to affect also pending proceedings. An additional problem is created by the prescription periods barring the action. Thus, in the case of infirmity of mind, if annulment proceedings are not instituted within one year after the cessation of the mental disease, the action is barred. Under canon law, infirmity of mind was held to imply absence of consent, i.e. an absolute nullity, in respect of which a Court declaration could be sought by the parties, unhindered by any prescription periods. Thus a marriage invalid under the canon law provisions of insanity could automatically become valid under section 20(b), if the one year cohabitation had already elapsed before the commencement of the 1975 law. Indeed, this is only one of the examples showing how retroactivity can result in the automatic validation of a marriage that was null under the law in force at the time of its celebration. As a result of revolutionizing the concept of nullity, the 1975 law impairs the vested rights of those who could annull under canon law but are no longer able to do so. On the other hand, it also negates the rights of that person who validly contracted marriage under canon law, and now finds that it is open to attack by the other spouse, e.g. on the ground of sterility, formerly unknown but now available to the non-sterile party. This state of law, which has Lasalle's approval in his theory of 'convalescenza', is opposed to that enunciated by Gabba, viz. 'La legge nuova, come non può togliere effetto ai rapporti giuridici validamente conchiusi sotto l'impero di una legge precedente cosí non può neppure attribuirlo ai rapporti giuridici invalidi in virtù della legge sotto cui vennero conchiusi.' This principle has also been curiously modified by the transitory provision of the 1973 Civil Code (Amendment) Act, which guaranteed that it would not by itself validate any act which was null at the time it was done, but at the same time barred for the future the action for annulment in respect of any such act.

Annulment must not be confused with dissolubility. A law abolishing divorce is made to apply even to marriages celebrated before its commencement; those persons who had not obtained a divorce under the old law cannot allege violation of their vested rights. Such an approach has *not* been accepted in English law. In the case *Blyth vs Blyth* (1966) – a case where plaintiff sought a divorce on the basis of the wife's adultery, decided by the House of Lords, it was implied that if the section being dealt with had been of a substantive nature, no retroactive effect could be given to it. Having regard to the fact that our Courts have gener-

ally followed continental law, however, it is difficult to believe how they can ever accept the English legal standpoint.

The law of persons involves the consideration of certain juridical conditions of persons, apparently capable of being treated under personal status. These are paternal authority, emancipation, tutorship, curatorship, and capacity of the married woman. Such conditions, however, are by no means creative of vested rights; they represent merely the machinery, exclusively contrived by the law, in view of ensuring the smoothest running of family life in accordance with the principles of child education and custody accepted in the community. They are just legal institutes that determine the juridical aspects of family life. It is not surprising, therefore, that cessation of any of the above conditions can occur in virtue of a new law, which thus legitimately receives immediate application. This was the line taken by the 1973 (Amendment) Act, in terms of which minors could become automatically subject to paternal authority and the 'status' of tutor, immediately lost and substituted by that of paternal authority. For the sake of continuity, it further provided that, if the tutrix was the mother, there was no obligation of rendering an account of her administration.

When we speak of the retroactivity of laws regulating status, therefore, we are including *only* those which deal with such status as is not capable of becoming a vested right of the individual. This substantial distinction between different kinds of status is made only in respect of laws regulating their *acquisition* or *loss*. In so far as their EFFECTS are concerned, no such distinction is made. This gives rise to the rule that a new law regulating the effects of status, irrespective of whether the latter constitutes a vested right or not, must receive immediate application. Accordingly, Pacifici Mazzoni says, 'Come gli effetti della filiazione legittima cosí quelli della filiazione naturale, riconosciuta e dichiarata, vengono immediatamente regolati dalla nuova legge.' Civil effects of marriage, effects of legal separation, adoption, legitimation, acknowledgement and even citizenship are regulated by the new law, even though their acquisition constitutes a vested right in the acquiring subject.

Another rule postulating retroactivity applies to laws governing capacity, itself defined as '*those preliminary conditions to be satisfied by the individual before a juridical act can be validly performed*'. Gabba treats capacity as signifying merely a modality of the right of citizenship, i.e. as implying the ways in which the individual can manifest his citizenship rights in the different

fields of law. Pacifici Mazzoni agrees with this view and says, 'La capacità invera è una facoltà che la legge riconosce e attribuisce ai cittadini ... questi sono dunque di nulla privati dalla legge che loro toglie o restringe la capacità di cui, al suo attuarsi, godevano mercè la legge anteriore.' Accordingly, laws governing the capacity to contract, to transfer real rights, or to acquire a particular status always receive immediate application. This, however, operates in such a way that vested rights actually acquired in terms of the rules of capacity prescribed by the old law remain unimpaired. Therefore, if a new law introduces the civil incapacity of the married woman, no such woman can claim that a vested right has been taken away from her; but she *can* claim that all the juridical acts performed by her under the old law retain their validity. Similarly, a law which determines what rights can be acquired in respect of things, according to their juridical status (e.g. what things can be privately owned) must receive immediate application, without impairing rights validly acquired under the old law.

Laws regulating the capacity to make wills, or to acquire an inheritance, present a more complex problem. The fact that they confer only 'facultative rights' is undoubted: a person who was capable of making a will *can* become incapable in virtue of a new law. What is less clear is what law will apply when a will has actually been made and *when the law in force at the moment when the testator made his will is eventually altered before his death.* The generally accepted view is that a will is juridically perfected only at the time of the testator's death, a principle which has induced legal writers as Lasalle to conclude that the juridical capacity to make a will is regulated *exclusively* by the law in force when the said death occurs. Gabba rejects this view because it contemplates the possibility of validating a will which was null when made. To prevent this automatic healing of a legally null act, therefore, he establishes the principle, also accepted by Pacifici Mazzoni, that the testator must be juridically capable both at the moment when he makes the will and at the time of his death.

An application of the doctrine of vested rights to the law of succession centres around the rule that a will cannot be creative of vested rights before the *decuius'* death. Accordingly, we find that, in transitory law, *devolution of inheritances is mainly regulated by the law in force when such death occurs.* This especially refers to:

(i) Laws which limit a person's liberty of disposing his pro-

perty by will, e.g. a law which increases the right of legitim.

(ii) Laws prescribing or prohibiting the juridical modes of effecting transfers *causa mortis*: e.g. a law which prohibits the institution of an *herede fiduciarius*.

(iii) Laws regulating devolution of inheritance, in intestate successions, taken as including the right of representation, and the apportionment of the deceased's estate.

On the other hand, *the law in force at time when the will is made regulates only such testamentary matters as are directly dependent upon the state of fact prevailing at the moment when the testator made his will*, namely:

(i) the form of the will, which is completely unrelated to the juridical possibility of revocation;

(ii) physical capacity, which is essentially geared to the testator's state of body or mind.

The law of obligations presents a fairly unified ground in its confrontation with transitory law. 'Il principio che regge tutta questa materia,' says Pacifici Mazzoni, 'è che le obbligazioni sono regolate dalla legge vigente al tempo in cui nacquero.' The same principle is enunciated by Gabba and has been repeatedly applied by our Courts. In Borg vs Borg (1907) it was decided that 'Fil-materja tal-kuntratti, il-ligi applikabbli hija dik ta' meta saret l-obbligazzjoni u meta seħħ il-kuntratt; u mhux dik ta' meta għandha tiġi deċiża xi kontroversja relativa, jekk fl-intervall il-liġi tkun tbiddlet, għaliex ... huwa preżumibbli illi ... forsi l-partijiet, kieku kienu jafu li l-liġi mhijiex il-qadima, ma kenux jagħmlu dak il-kuntratt.' The principle virtually encompasses the entire field of obligations within its sphere of operation. Accordingly, *the law in force at the time of formation of the obligation regulates:*

(i) The validity or invalidity of the obligation, including capacity of the parties and vitiation of their consent on the grounds of error, violence or fraud.

(ii) The juridical aptness of the object of the obligation and the cause of such obligation.

(iii) The juridical character of the obligation, e.g. whether it is *in solidum* or not, or whether it is civil or natural.

(iv) The effects of the obligation, even if peculiar to a special type of obligation, e.g. the effects of sale.

(v) The effects of obligation, vis-à-vis third parties, though subject to some minor exceptions.

(vi) Extinction or dissolution of the obligation, including dis-

solution of the community of acquests. This principle has been violated by the 1975 Civil Code (Amendment) Act, which retroactively abolished the juridical possibility of rescinding a sale or a partition on the grounds of lesion.

The law of property, viewed in the light of transitory law, gives rise to a great deal of complexities. The reason for this is that its underlying principle is reflected in the legislator's faculty of regulating the juridical condition of things, of introducing new real rights or abolishing already existing ones, and of modifying their effects. This has induced Gabba to affirm that laws regulating status include also those which govern the juridical condition of things. Status, therefore, can be personal or real; and, in both cases, it is productive of the same consequences in transitory law. This explains why a law which prescribes new distances to be observed in the construction of buildings must receive immediate application. No person who has *not* constructed buildings under the old law can allege the violation of this 'vested right' to build at a closer distance. Accordingly, real rights just like 'rights' regulating personal status are only mediately productive of vested rights: in other words their conversion into vested rights requires their actual exercise by the acquiring subject. This position radically differs from that prevailing under the law of obligations, the reason being, as Pacifici Mazzoni puts it, 'che i singoli effetti del diritto reale non si possono, come quelli delle obbligazioni, considerarsi propriamente svolgimenti o trasformazioni del diritto quesito; perchè è in piena balia del legislatore il prestabilire i modi e i limiti nei quali i cittadini possono disporre ed usare di ... cose materiali, e quindi nessun cittadino può accampare di fronte al legislatore in diritto quesito e un dato uso di quelle cose.' Society's interest in the regulation of real rights is juridically reflected in the fact that such rights are enforceable, not against determinate individuals, but against everybody.

A special feature of real rights which does *not* arise in the case of personal status, however, results from the possibility that certain effects of real rights can be guaranteed by the constitutive contract, as, for instance, emphyteusis, pledge, and conventional hypothec, which are, by their own nature, contractual. It is only too natural that those effects of real rights which are guaranteed in the contract cannot be modified by the new law. The extent to which this principle has been rejected by the 1976 amendments on emphyteusis will be dealt with later.

The two features of real rights so far dealt with account for the rule enunciated by Gabba whereby '*gli effetti dei diritti reali pos-*

sono bensì venire tolti o immutati da una legge nuova con retroattivo o immediato effetto, finchè non siano esercitati o dedotti in una convenzione, ma diventano veri e propri diritti quesiti intangibili in virtù di quei fatti.' Here, therefore, we see how in the law of property the general principle, that a vested right comprises also its effects, is modified in so far as the vested real right comprises only such effects as have in fact been put into execution or drawn up in the constitutive agreement.

By way of a precautionary measure, Gabba rightly indicates the danger of confusing 'i veri e propri effetti del diritto reale' and 'quelli che piuttosto sono effetti del titolo su cui il diritto medesimo in ogni singolo caso riposa'. This implies that whereas the truly real effects are liable to be immediately regulated by the new law, *those effects which necessarily result from TITLE are, of their own nature, acquired at the moment when the real right is constituted.* Gabba, for example, holds that the right of the creditor to retain the pledged *res* in special circumstances is one such effect, which, if permissible under the law in force when the constitutive contract came into being, should not fall subject to the provisions of a new law abolishing such right. The 1975 amendments, effected to the institute of pledge, were applied retroactively by our legislator; but, having regard to their trend of *conferring* new rights, it may be said that they could not have impaired any vested rights. As to hypothecs, the same author points out that the right of priority of a hypothecated debt, the extension of such debt, and the determination of the object of the hypothec, must be regulated by the law in force when the hypothec is constituted. In emphyteusis, the theoretical position is that the relations between the direct owner and the emphyteuta are regulated by the law in force at the moment of conclusion of the constitutive contract. In practice, however, the trend of modern legislators to facilitate the free transfer of immovable property has induced them to extend, in the public interest, the real as opposed to the contractual element in emphyteusis, with the result of enacting that ANY effects, subjected to amendment, are to be regulated by the new law. This is more or less the line taken by the 1976 amendments, which, besides reducing the contractual liberty of the parties, are made to apply to all emphyteuses constituted before January 1976, except those terminated before that date, or those determined or dissolved by agreement, by operation of the law, or by a judgment that had become *res judicata.* Indeed, this provision runs counter to the principle that a contract is regulated by the law in force at the moment of its conclusion, for it has the effect

of nullifying clauses in emphyteutical contracts made before the said date and which are still in existence, insofar as they are in violation of the Amending Act.

If it is a generally accepted principle that the effects which *necessarily* flow from title should not fall subject to a new law, it logically follows that *the title itself, grounding the acquisition of the real right, is, as in the case of any other right, regulated by the law in force when the acquisition is perfected.* This, in turn, gives rise to the following rules:

(i) Laws which determine the juridical status of things in relation to the real rights, of which they can form the object, should receive immediate application without impairing rights acquired in virtue of the old status. Therefore a law prescribing that only immovables can form the object of the right of usufruct cannot nullify rights of enjoyment over movables validly acquired under the old law.

(ii) Validity of the acquisition, and the formalities necessary to give it effect vis-à-vis third parties are regulated by the law in force at the moment of perfection of the acquisition.

(iii) A law introducing new modes of extinction of real rights should not apply to those rights constituted before its commencement. This principle has been, to an extent, violated by the 1975 (Amendment) Act, which provides that general hypothecs are extinguished if the property to which they attach passes into the hands of a third part, and that general hypothecs constituted under the old law will not remain valid after the expiration of 10 years after the commencement of the said Act.

Perpetual real rights are subject to the above principles only to the extent that the changes effected to them are not *essentially* related to their perpetual character. Insofar as laws directly affecting their perpetual nature is concerned, however, they fall under a régime of their own. They are at the complete mercy of the legislator, who is entitled to modify or even abrogate perpetual institutions as he deems appropriate in the public interest. Indeed, to say otherwise would mean that once such an institution is created by law, it must continue to exist forever; and eventually that would constantly and surely hinder the course of social progress. Gabba suggests that the complete abolition of a perpetual right, e.g. entail, should give rise to the State's obligation of granting compensation, just as in the case of expropriation.

It is now necessary to see whether the doctrine of vested rights can gain access into those branches of law which imply a direct confrontation between the individual and State authority, viz. an

administration law, fiscal law and emergency law. Most of the laws enacted in these spheres are characterized by their tendency to impose restrictions on the individual, while increasing the dose of State control. In administrative law, for example, the process of delegation by Parliament of administrative powers, viewed against the complications of State machinery and the increasing exigencies of the modern welfare State, necessarily implies an irresistible growth of State authority. Similarly the *raison d'être* of fiscal laws, e.g. laws of income taxation, is the principle of social justice which demands that the individual must actively contribute to the public good, each according to his financial capacity. Finally, emergency laws, by definition, tend to impose extraordinary restrictions upon individual action, their justification being that they are enacted in circumstances that inevitably warrant an enormous increase of State power, such as in wartime. This common characteristic of the laws under discussion shows the paramount importance of the doctrine of vested rights in those areas of law where the individual is in most manifest jeopardy. Here, the retroactive application of the new law generally implies a deterioration of individual liberty, and, therefore, the impingement upon a true vested right. Gabba's assertion that 'il rispetto dei diritti acquisiti si fonda in sostanza sul rispetto dell'individuo' is especially true in those fields, where the State and the individual continually face each other in a common arena.

Writers like Clementine and de la Grassaye believe that retroactivity is a unitary concept which receives application in ALL fields of law. Italian Courts have accepted this view when they affirmed that the principle of non-retroactivity enunciated in the Preliminary Title to the Civil Code is applicable also to 'norme amministrative e tributarie'. In Malta, the doctrine of vested rights has been explicitly declared to be applicable to fiscal and emergency law. In as early as 1902, in *Gasan vs Zammit* – where the Court was requested to determine the amount payable by plaintiff in stamp-duty – it was held that '*in materia di tassa ed imposta è principio di giustransitorio che tanto per determinare chi sia responsabile della tassa quanto per determinare l'imposto di questa, vuolsi avere riguardo alla legge vigente nel giorno in cui son posti in essere gli atti ed affari colpiti dalla tassa.*' The same principle was accepted in *Cassar Torreggiani vs Gatt.* In this case, the Court had to decide whether a new law which increased from one to ten years the pre-death period within which any donations effected could become subject to the payment of death duty was applicable retrospectively. It was held that al-

though the 1948 law was of a fiscal nature, it could not be applied retroactively because it would impair the plaintiff's vested right to pay death duty only in respect of donations made not earlier than one year period allowed under the old law. Parallel to these two decisions, there is an Italian judgment delivered by the Court of Appeal on the 7th December 1967, which established that: 'Il principio che la legge non dispone che per l'avvenire ... salvo specifica volontà contraria del legislatore sancito dall'articolo II ... vale anche nel campo del diritto tributario.' Indeed, the legislator's option to impair the doctrine of vested rights subsists all the more in fiscal matters. *Testa vs Briffa*, for example, confirms that 'è pacifico in dottrina e nella giurisprudenza che anche a leggi di Finanza si è trovato talvolta conveniente nello interesse dello Stato di dare effetto retroattivo.' From the point of view of transitory law, therefore, it can be safely concluded that, in Malta, a new fiscal law does not receive immediate application, irrespective of whether it impairs vested rights or not. The interest of the State, in fiscal legislation, is reflected in a rule of construction quite unrelated to retroactivity, which was enunciated in *Anastasi vs Camilleri* (1964): 'Il-liġijiet tributarji għandhom jinterpretaw ruħhom skond l-ispirtu u l-ittra tal-liġi ... u fid-dubju għandhom pjuttost jiġu riżoluti affermativament,'l għaliex il-kawża tad-dazju jew imposta, xi tkun, hija ta' utilità pubblika.'

Emergency laws, known in Italian law as 'leggi eccezionali', have also been dealt with by the Maltese Courts. In *Butler vs Skipwkith*, the Court of Appeal, reversing the judgment of the lower court, held that since the defendant did not specifically request the Court to determine the retroactivity or otherwise of the 1942 Regulations, it could not deal with it of its own initiative, because this would impair the procedural principle that the Court must base its decision upon such legal points as are specifically raised by the parties in the writ of summons. This approach implies that the principle of innate retroactivity of emergency laws does not exist under our law. Indeed, if such principle were applied, the Court of Appeal would have inferred retroactivity from the very nature of the regulations, thus preventing itself from having recourse to the procedural principle referred to.

In the sphere of administrative law, as it operates in normal citizen life, the doctrine of vested rights is on less stable ground. This is so because of the infinite variety of laws that can be enacted in this field. Their subject-matter can range from education and wage-regulation to imports, requisition, country planning, etc. The logical outcome is that non-retroactivity is *not* bound to

be absolute: its relativity to the particular sector of public order that is being dealt with in the individual case cannot but have a bearing upon the end result. To say that the doctrine of vested rights is of no relevance in its application to the so-called subsidiary laws made by administrative bodies would definitely run counter to justice. Of course, the fact that this latter theory has been discounted in emergency matters seems to suggest the approach of discounting it in all other areas of public administration. A case which explicitly confirms this idea is *Baldacchino vs Caruana Demajo*, where the Court decided that '*meta ma hemmx klawsola retroattiva, u meta l-kliem tal-liġi ma jkunux jimportaw retroattività, ma għandux ikun hemm effett retroattiv, lanqas jekk tkun materja ta' nteress jew ordni pubbliku.*' The issue involved in that case was whether a Legal Notice prohibiting the importation of Russian films could receive retroactive application. Relying on the principle quoted, and on the English law position, whereby all laws, except those of a procedural nature, should apply for the future, the Court decided that the Legal Notice did not apply to the plaintiffs; and this because it came into force *after* the importation of the said films had been perfected.

Defying the absoluteness with which the Caruana Demajo case established the application of the doctrine of vested right in all sectors of administrative law, however, *Fenech vs Zarb* acknowledged, in its turn, the inevitability of recognizing the natural retroactivity of laws, which are so intimately connected with public order that they transcend all possibility of judicial affirmation of the existence of vested rights. In this case, the question arose whether the amendments effected to the University Statute could be applied retrospectively to students who had already started their course before the amendments were passed. The Court said that '*biex l-emendi ma jkunux retroattivi . . . hemm bżonn li jsibu ostakolu fid-dritt kweżit ta' l-istudenti, u li ma jkunx il-każ ta' liġi li tinteressa l-ordni pubbliku.*' Moreover they failed to satisfy this test, on both counts. Registration for a particular course did not create any contractual relationship between the University and the students, and as regards the argument of public order, it was held that 'il-materja ta' l-istruzzjoni hija ta' nteress pubbliku u hekk ukoll huma l-liġijiet li jikkontrollaw dik il-materja, u għalhekk ebda dritt ma jista' jiġi akkampat kontra emendi li jmissu r-regolamenti tat-tagħlim u l-istruzzjoni.' After quoting Pacifici Mazzoni, who points out that laws relating to public order are retroactive, it upheld Gabba's argument which envisages how the individual may find himself bound to submit to

the 'scopi o funzioni di pubblico interesse' with the result that he cannot acquire any vested rights, and that he must subject himself to any new law which alters the existing elements of public order. There are certain sectors of human life which have assumed the status of proper State functions, e.g. education, and public health. Any laws which regulate such sectors are in the nature of what Gabba calls 'concessioni politiche', which are revocable by the legislator at his will. What distinguishes these concessions from those 'nelle quali lo Stato apparisce datore nello stesso modo in cui lo potrebbe essere un privato' – a distinction which echoes the old tragic concept of *jure imperii – jure gestionis* – is not capable of being subjected to any *a priori* test. The view that *our Courts have accorded retroactivity to a law which pertains exclusively to public order* seems to break down under the basic uncertainty of its application. Yet it does have the merit of establishing the truth that our Courts employ a great deal of caution before deciding to exclude the doctrine of vested rights from the administrative law field. Torrente's assertion that laws of public order are retroactive only if so intended by the legislator is *not* valid because in the Caruana Demajo case, it was obvious that the legislator *did* intend retroactivity, which, however, was not granted by the Court. The only safe conclusion to arrive at is that *under our law, laws relating to public order are not essentially retroactive. The course of their operation is determined by the Courts after conducting an objective analysis of the degree of intimacy between them and the sector of public order in which they are allegedly rooted.* This precarious condition, though in itself undesirable, is the logical outcome of the immense role of public order in modern States.

The power to make retroactive subsidiary legislation is dealt with by the 1975 Interpretation Act, in *Section 9*, which provides that such power is deemed to be implied, in all parent Acts, irrespective of whether passed before or after commencement. Section 9, however, is applicable only to subsidiary legislation made *after* commencement. Accordingly, any subsidiary laws made before 1975 are still regulated by the principle upheld in *Baldacchino vs Caruana Demajo* and *Bernard vs Attard*, whereby a specific provision in the parent Act is necessary to give rise to the power of making retroactive laws under the said Act.

In connection with the theory of public order in transitory law, it is appropriate to indicate the peculiar status attributed to procedural laws and police laws by Maltese Courts. As regards police laws, the principle applicable is that enunciated in *Police vs*

Falzon, which states that 'non vi può essere diritto quesito in virtù di leggi anteriori ad escludere l'applicazione di leggi nuove.' Accordingly, police laws are intrinsically retroactive; the new law always receives immediate application, and the citizen is at all times expected to abide by it. Incidentally, the said principle refers only to police laws of a *non-penal character*, the penal ones being themselves juridically assimilated to ordinary criminal law norms.

Procedural laws tend to create a great deal of complexities in transitory law, and, as such, they must be viewed in the light of the various attitudes that can and have, in fact, been adopted towards them by different States. The general view is that once a law is classified as procedural, it must of its own nature have a retrospective effect. This is the situation under English law, which results from the erroneous attitude of treating procedural law on a purely procedural level. In *Blyth vs Blyth*, for example, L.J. Williams, while referring to the retroactivity of a procedural provision, said: 'To say that this involves the section being given retrospective effect is, I think, perhaps misleading. The true view is that the section looks forward to the conduct of trials that take place after the coming into force of this Act.' The superficiality of this argument is all too obvious. Nevertheless the English position has been invoked in *Baldacchino vs Caruana Demajo*, where the Court inferred the principle that laws relating to public order are *not* by nature retrospective from the fact established by English judges that *only* procedural laws are innately retrospective. Even more perplexing is the approach adopted in *Police vs Camilleri* (1964), where it was decided that the action impugning the validity of the Proclamation had been correctly referred to the Civil Court, First Hall, under the provisions of the *1961 Constitution*.[1]

The problem which emerges from *Police vs Camilleri* is whether Section 12(1)(e) can, if subjected to the same interpretation, have the effect of abrogating the principle of retroactivity of procedural laws, when procedural changes are effected by *repealing* Act. The truth is that Section 12(1)(e) is really dealing with laws abrogating rights of action, not laws effecting procedural changes. Indeed, having regard to the strictly narrow meaning attributed to 'repeal' by the 1975 law, it can be concluded that a repealing Act which effects procedural changes would qualify as an amending Act

[1] The logic adopted by the Court was that section 38(2)(e) of the U.K. Interpretation Act of 1889, *which corresponds to Section 12(1)(e) of our 1975 law*, gave *ultrattività* to the 1961 Constitution even in procedural matters.

under the said law. This interpretation results from Section 12(3), which provides that amendment includes also 'where *an Act* or provision thereof *is repealed and a different provision made in the place thereof*'. In line with this reasoning, changes of procedure would fall under Section 12(2), which provides that 'the Act or provision amended as well as anything done thereunder or by virtue thereof shall, unless the contrary intention appears, continue to have full effect, and shall so continue to have effect as amended, and subject to the changes made by the Amending Act.' Does this sub-section throw any new light on the position of procedural laws in the *gius transitorium*, and more especially on the judicial standing of pending proceedings vis-à-vis a new procedural law? An objective answer is reached if we first examine the present conflicting theories on the subject, themselves reflected on the equally conflicting cases: *Buttigieg vs Gatt* and *Chetcuti vs Micallef*.

In *Buttigieg vs Gatt*, a case of lease, the defendant raised the plea of incompetence on the grounds that, after the submission of the writ of summons, a new law was enacted which removed jurisdiction from the Ordinary Courts to the Rent Board. The Court accepted the plea because it held that the principle that procedural laws should not affect pending proceedings does not apply, if the legislator shows a contrary intention. In support of this argument, it said: 'Inkwantu għall-proċeduri avvjati ... il-liġi l-ġdida ma tistax tkun retroattiva, imħabba fil-prinċipju ben konoxxut *ubi judicium acceptum, ibi et finem accipere debet*, u mħabba fil-prinċipju komuni fondamentali u ġenerali l-ieħor *in subiecta materia* li l-attijiet magħmula u mmexxija ma jistgħux minn liġi ġdida jiġu kunsidrati bħala mhux magħmula sabiex ikunu mibdulin jew sostitwiti minn attijiet ġodda.' On the other hand, in *Chetcuti vs Micallef*, the Court, following Gabba, accepted the plea of incompetence on the grounds that pending proceedings are to be affected by a new procedural law as much as proceedings not yet initiated. Accordingly, it referred the case to the Land Arbitration Board. If these two cases are viewed in the light of the 1975 law, we find that the doctrinal problem is still intact: the question whether a case still pending is juridically complete still depends on the Courts' discretion, thus leaving it open to them to accept or reject the plea of incompetence.

As is too readily appreciated, this state of law is outright undesirable. In Italy, all doctrinal confusion has been abolished by Section 5 of the Code of Civil Procedure, which provides: 'la giurisdizione e la competenza si determinano con riguardo allo

stato di fatto esistente *al momento della proposizione della domanda* e non hanno rilevanza rispetto ad esse, i successivi mutamenti dello stato medesimo.' Indeed, Italian law, unlike Maltese law, has managed to emancipate itself from Gabba's influence, by way of a general provision, implying the principle that pending proceedings ought not to be affected by procedural laws newly enacted. Our law is in desperate need of such a provision, and until this position is reached the entire subject is to be regulated on the basis of continental doctrine.

The persisting influence of Gabba upon Maltese Courts is reflected in their obstinate willingness to treat the retroactivity of procedural laws as forming part of a general theory of public order. The two cases quoted above, conflicting as they are, concur in the view that changes in procedure are effected in the public interest, and are therefore retrospective. A more flexible approach is admittedly shown in criminal proceedings. In *Police vs Borg*, for example, the Court had to determine whether section 19 of the Housing Act – which dealt with the right to appoint a representative to physically incapable persons who failed to deliver the keys to the Housing Commissioner – was retroactive or not. The decision arrived at was that the right of representing the accused was not purely a procedural norm; it had certain substantive implications, because in Maltese law no judgment can be delivered *in absentia* by the Criminal Courts, and it is only upon request of the defence counsel that the right of representation can be exercised. The criteria adopted were neatly expressed in the following words: '*Il-prinċipju illi d-dispożizzjonijiet ta' proċedura japplikaw retroattivament ma hux daqshekk ġeneriku u assolut, f'materja penali ... Imma għandhom din l-applikazzjoni retroattiva dawk il-liġijiet penali ta' proċedura li huma strettament proċedurali biss, u mhux ukoll dawk li huma intimament konnessi mal-merti tal-kawża. Dawn ta' l-aħħar ma għandhomx dan l-effett retroattiv.*'

In *Police vs Borg*, the Court dismissed the English law idea that procedural laws are innately retroactive, including those applicable to criminal actions. It endorsed the severe, critical comments made by Cheveau et Helie, Zuppetta and other writers, who find the English position not only unreasonable, but also unjust if applied without restrictions in the criminal law field. The Maltese situation, of course, is slightly better than the English one, but it is still in need of change. *The desirable legal course to take would be to enunciate by way of a general provision that a new procedural law will not affect pending proceedings, and further to*

guarantee in a criminal action the right of the accused to continue the proceedings in conformity with the new law, if this lies in his favour. Accordingly, the 'penale retroattiva', which will soon be dealt with, would become applicable also to a procedural penal law if the defence so requests.

Constitutional law is precisely that branch of law which presents the greatest paradox. This results from its innate quality of being the only part of public law which, paradoxically, protects the individual against the possible abuses of State authority. The general outcome is the trend of constitutional law to favour individual rights at the expense of the State. Here, in fact, we find that a new constitutional norm does *not* tend to impair vested rights, but to perfect them, or even create them, brand-new. Gabba seems to maintain that when a law does *not* impinge upon vested rights, it should receive immediate application: a principle which some writers have raised to the status of a general theory that all laws favourable to the individual should be retroactive. This view, however, has been discounted by our Courts in *Police vs Camilleri* (1964), where it was held that 'Il-kostituzzjonijiet huma soġġetti għall-istess regoli ta' nterpretazzjoni bħal-liġijiet oħra, u waħda mill-aqwa fost dawn hi dik tan-nonretroattività.' Moreover, the maxim *omnis nova costitutio futuris formam imponue debet non praeterem*, was held to mean that *'il-liġi l-ġdida m'għandhiex tfixkel drittijiet akkweżiti jew vested rights, speċjalment meta si tratta ta' human rights.'* The final decision, therefore, was that the points of substantive law involved in the case – viz. the rights of freedom of expression and association – would be regulated by the *1961* Constitution, under which the causes of the original criminal action had arisen. It was of no consequence that the action impugning the validity of the 1964 Proclamation was instituted *after* the 1964 Constitution had come into force. In support of the principle that the constitutional norm was just like the ordinary legal norm creative of a vested right, the presiding Judge made reference to a case decided by the Indian Supreme Court, which concerned the question whether the Indian Constitution (which *for the first time* incorporated human rights provisions) could be applied retrospectively. Since the person accused was formerly devoid of constitutional protection, retroactivity would have the effect of acquitting him of political offences charged against him. The said Court, however, refused to apply the theory of retroactivity of favourable laws, and allowed the prosecution to maintain the action. The same position prevails in Italy. In January 1968, the Constitutional Court was faced with an administra-

tive law which had been in force prior to the commencement of the Republican Constitution, and, which although originally valid, eventually became incompatible with the provisions of the said Constitution, on their coming into force. After holding that such incompatibility grounded invalidity, the presiding Judges reached the conclusion that the effect would be to invalidate all acts performed under that law *after* the commencement of the new Constitution. Therefore, anything done under that same law *before* the Constitution came into force retained its full legal force. In Malta, even before Police vs Camilleri, the theory of favourable laws had been effectively rejected by our Courts in *Caruana Curran vs Camilleri*, where it was held that a law exempting from import duty certain specified objects, including that imported by plaintiff, was not retroactive in the absence of a special transitory provision to that effect. Accordingly, the plaintiff was condemned to pay, because he had already imported his laminated silver foil when the regulations came into force. The over-all situation is that the principle of non-retroactivity works in all directions: it gives rise to the doctrine of vested rights and vested liabilities, and as such, can protect as well as prejudice individual rights. This in fact, is the line taken by the 1975 Interpretation Act, which in section *12* provides that a repealing Act shall not efface any liability incurred under the repealed Act, and shall not affect any investigation or proceedings in respect of facts arising under the repealed Act, even if such facts warrant the infliction of some form of penalty or punishment.

In the constitutional law sphere, what is of paramount importance is *the process whereby an ordinary legal norm can, owing to its retroactive operation, find itself in conflict with some constitutional precept.* This has been emphatically pointed out by the Italian Constitutional Court in a 1957 case, where, after asserting that retroactivity is constitutionally prohibited only in the criminal law sphere, it clarified the fact that 'con ciò, non si vuole escludere che in singole materie, anche fuori di quella penale, l'emanazione di una legge retroattiva possa rivelarsi in contrasto con qualche specifico precetto costituzionale.' Therefore, outside the criminal law sphere, although retroactivity does not automatically imply constitutional invalidity, a law can be declared invalid on the grounds that its retroactive operation runs counter to some principle sanctioned by the Constitution. This is precisely what happened in 1966, when the Italian Constitutional Court declared invalid a law which retroactively imposed taxation upon persons who had alienated building sites within a specified legal period.

The reason put forward by the Court was that 'such retroactivity violated *section 53* of the Constitution (which provides that everyone is to contribute to public expenditure in proportion to his resources), because it failed to take into consideration whether the financial or economic gain derived from the alienation still remained within the patrimony of the transferor. Accordingly, it was held that a retroactive fiscal law can become invalid, if 'con l'assumere a presupposto della prestazione un fatto o una situazione passati, o con l'innovare, estendo i suoi effetti al passato, gli effetti dai quali la prestazione trae i suoi caratteri essenziali, abbia spezzato il rapporto che deve sussistere tra imposizione e capacità contributoria, ed abbia cosí violato il precetto costituzionale.'

In Criminal law, the doctrine of non-retroactivity is neatly expressed in the maxim *nullum crimen sine lege, nulla poena sine lege*. The strong political ingredient which animates the maxim is responsible for the special features which characterize the principle of non-retroactivity of the criminal law. As the Italian writer Antolisci Francesco points out, 'La massima è il palladio delle libertà politiche': it ensures that no person will be penalized for an act which does not constitute a crime at the moment of its commission. This absolute predicability on the part of the accused, that he cannot be convicted for such an act, has been sanctioned by the constitutions of most democratic countries. The Italian Constitution, in section 25(2), provides: 'Nessuno può essere punito per un fatto che non sia espressamente preveduto come reato dalla legge, ne con pene che non siano da essa stabilite.' The same principle is applied by *section 40(8)* of the Maltese Constitution. In the U.K., the doctrine of non-retroactivity of the criminal law cannot operate on the constitutional law level; it is nevertheless applied by English Courts on basis of the 1889 Interpretation Act. In the case *R. vs Reah* (1968), for example, the Court of Appeal had to determine whether section 4(7) of the Criminal Justice Act, which dealt with the offence of receiving stolen property, was retroactive in effect. Its final decision was that since the said section was not procedural, it was *not* retroactive and could not apply to the defendant because its provisions came into force *after* he had committed the alleged offence. The appeal was allowed, and the defendant acquitted. By contrast, those States which do not recognise the need for such protection, e.g. Algeria, are thereby upholding their sovereign power of criminalizing such past acts as they might deem appropriate, thus impinging upon the human right to liberty, and even the right to life,

whenever the death penalty is contemplated.

The Latin maxim guarantees not merely predictability of non-conviction on the part of the accused, but also predictability of non-subjection to a higher penalty. Therefore, if the penalty for a particular offence is increased by a law enacted *after* its commission, such law cannot be applied retroactively by the Courts. This, in fact, represents the minimum content of the *nulla poena* limb of the maxim. By way of an equitable concession, the range of this principle has been enlarged, with the result of introducing an element of paradox. Many Criminal Codes, including the Maltese Code in *section 28*, have accepted the theory that *when a new law, enacted in the interval between the moment of commission of the offence and the delivery of sentence, mitigates the penalty in respect of that offence, it should be applied in preference to the old law.* This is the what Gabba calls 'penale retroattiva', i.e. the process whereby a criminal law norm created before delivery of sentence must receive retroactive application, if it favours the accused. Some writers have attempted to provide a juridical basis to this equitable principle and affirmed that what is really involved here is not really retroactivity but the notion of *non-ultrattività* i.e. the notion whereby a criminal law norm cannot continue to operate, after its repeal or amendment, if it is more severe than the repealing or amending norm. This idea has been accepted by our Courts in *Police vs Camilleri*, where they referred to the '*non-ultrattività* della legge precedente', and rejected in *Police vs Bugeja*, where they described how, by way of exception, *section 28* gives '*efficacia retroattività alla legge posteriore.*'

The readiness with which our Courts have so far applied the 'penale retroattiva' is illustrated by *Police vs Mifsud* and *Police vs Bugeja*. In the first case, it was decided that *section 28* contemplates not merely a new law which diminishes criminal punishment, but also a law which provides that an act no longer constitutes an offence. At this point, however, a doubt immediately arises, in virtue of section 12(1)(e) of the Interpretation Act, which, as already indicated, provides for the *ultrattività* of a repealed law, even if it had imposed a penalty or some other form of punishment. In other words, the repeal of such a law no longer benefits the defendant in criminal proceedings which are still pending, nor can it halt future prosecutions in respect of the offences repealed, committed while the repealed Act was still in force. This provision, of course, has drastically reduced the sphere of operation of the 'penale retroattiva', and in fact has has been denied access into that area where it had most benefited

the accused. Having regard to its far-reaching effects, therefore, it is not surprising that the interpretation of *section 28*, given in the Bugeja case, has now been overruled. Another logical outcome of the new restricted concept of 'penale retroattiva' is that the 'leggi passeggiere di polizia' no longer occupy a special place in this equitable doctrine. Prior to 1975, the Courts had always acknowledged that *ultrattività* is NOT proper to the nature of a criminal law norm, the only exception to this principle being the *transitory police laws*, i.e. those police laws which provide that, owing to essentially transitory circumstances, certain acts will constitute an offence, or that certain acts will be deemed offences for a specified period of time. Accordingly, under the old law, these were the ONLY penal laws which survived their own repeal. In *Police vs Bugeja*, for example, it was held that although an emergency law was essentially transitory in its character, it did *not* qualify as a transitory police law, and therefore, the principle of *ultrattività* could not be applied in its regard, in the absence of a specific provision to that effect in the repealing law. Similarly, in *Police vs Camilleri*, which involved the offence of selling meat at a price higher than that fixed by the Government, the Court held that a 'legge penale temporanea', in spite of its temporary character, was *not* subject to *ultrattività*, and as such its repeal extinguished all possibility of continuation of present proceedings as well as of initiation of future prosecutions. Under the 1975 law, all these safety-valves are inefficient. Indeed, *the principle of ultrattività, in all cases where an offence is altogether repealed, is now absolute*. Its application does not even require the condition that the criminal law norm concerned be of a 'temporary' or transitory nature. In this respect, it goes against *section 2* of the Italian Criminal Code, which provides that the 'penale retroattiva' is inapplicable ONLY to 'leggi eccezionali e temporanee'.

The doctrine of non-retroactivity of the criminal law, under our law, therefore, is three-dimensional:

(i) It imposes, under pain of constitutional invalidity, that a law increasing criminal punishment or creating a criminal offence cannot be retroactive.

(ii) Secondly, the 'penale retroattiva' operates in virtue of section 28 of the Criminal Code within the limits prescribed by the Interpretation Act analysed above. This, however, does not operate on the constitutional level, and the legislator is free to enact that a law mitigating criminal punishment will *not* apply to offences committed under the amended law.

(iii) The principle of *ultrattività* is *implied* in all cases where an offence – whether transitory or not – has been repealed. The legislator however is still free to enact that the repealing Act will halt all future prosecutions.

The concept of retroactivity is inseparable from that of *time*. It seeks to make as smooth as possible the periods of transition that underly the courses of social progress. It aims at creating a new future, without unravelling the facts of the past. Change remains forever its main slogan: a peaceful change that tends to respect the individual and his vested rights, in accordance with equity and justice.

References to Cases, in the order, mentioned in the article:

1. *Azzopardi Zammit vs Formosa*, Vol. 28, Part 3, Page 715, (1934).
2. *Mizzi vs Farrell*, Vol. 32, Part 1, Page 219, (1945).
3. *Cilia vs Farrugia*, Vol. 33, Part 1, Page 457, (1949).
4. *Borg vs Borg*, Vol. 20, Part 1, Page 68, (1907).
5. *Salamone vs Mifsud Speranza*, Vol. 29, Part 3, Page 18, (1934).
6. *Gasan vs Zammit*, Vol. 18, Part 3, Page 111, (1902).
7. *Cassar Torreggiani vs Gatt*, 12th May, 1950.
8. *Testa vs Briffa*, Vol. 14, Part 2, Page 24, (1919).
9. *Anastasi vs Camilleri*, 15th April, 1964. Part 2, Page 952.
10. *Butler vs Skipwkith*, Part 1, Page 400, (1964).
11. *Baldacchino vs Caruana Demaio*, Vol. 38, Part 1, Page 61, (1954).
12. *Fenech vs Zarb*, Vol. 36, Part 1, Page 236, (1952).
13. *Bernard vs Attard*, Vol. 32, Part 2, Page 136, (1945).
14. *Police vs Falzon*, Vol. 24, Part 4, Page 1048, (1921).
15. *Blyth vs Blyth*, Weekly law Reports, Vol. 2, Page 634, (1966).
16. *Police vs Camilleri*, 7th January, 1965, Part 2, Page 605, (1964).
17. *Section 12(1)(e) of Interpretation Act:* 'Repealing Acts passed after the commencement of the 1975 Act shall not – unless the contrary intention appears:

(e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture or punishment, may be imposed, as if the repealing Act had not been passed'.

18. *Buttigieg vs Gatt*, Vol. 33, Part 2, Page 159, Dec. 1947.
19. *Chetcuti vs Micallef*, Vol. 38, Part 1, Page 146, (1954).
20. *Police vs Borg*, Vol. 33, Part 4, Page 957, (1949).
21. *Caruana Curran vs Camilleri*, Vol. XLIII, Part 2, Page 786, (1959).
22. 1966 case on retroactivity, delivered by Italian Courts: Judgment No. 44 of 1966: Repertorio.
23. *R. vs Reah*, Weekly Law Reports, Vol. 1, Page 1058, June, 1968.
24. *Police vs Camilleri*, Vol. 14, Part 4, Page 934, (1919).
25. *Police vs Bugeja*, Vol. 14, Part 4, Page 941, (1920).
26. *Police vs Mifsud*, Part 4, Page 931, (1922).

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Repertorio Generale della Giurisprudenza Italiana.