RETROSPECTIVE RULE MAKING AND THE RULE OF LAW: BETWEEN FAIRNESS, MORALITY AND CONSTITUTIONALITY

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ABSTRACT

In this note it is submitted that there are two types of retrospective rule making (RRM): RRM in the strong sense and RRM in the weak sense. In the former we have a rule that changes the legal status or legal consequences of an act that was committed before the rule was created; or a rule that changes the legal status or legal consequences of a state of affairs that existed (and ceased to exist) before the rule was created. This is the common perception of RRM. In the latter we have a rule that changes the legal status or legal consequences of an act that has started before the rule was created, yet this is an ongoing act that is still being committed in the present and continues into the future; or a rule that changes the legal status or legal consequences of a state of affairs that existed before the rule was created – and continues to exist after the rule was created. Both types of RRM can be unfair, immoral or illegal. The cases of the rules governing non-EU immigration to the UK and the rules governing student loans in the UK are used as text-cases that exemplify the differences between the different types of RRM. The note concludes that (a) the changes that were made during the last 3 years to the immigration rules that apply to non-EU immigrants have constantly been retrospective in nature; (b) these changes are in clear violation of the rule of law; and (c) some of these changes are unfair, while others are immoral and/or illegal. It is also argued that the changes that were made in 2015 to the rules that apply to student loans are also retrospective; that some of them are either unfair or immoral – but none of them is illegal.

I. INTRODUCTION

In this paper we explore the true nature of retrospective rule making (RRM) and argue that there are two types of RRM: RRM in the strong sense and RRM in the weak sense. We then offer criteria for deciding whether RRM in the weak sense is unfair, immoral or unconstitutional. We conclude by analysing two test-

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cases that exemplify the meaning of RRM in the weak sense and the suggested way to determine its fairness, morality and constitutionality: the case of the rules governing non-EU immigration to the UK and the case of the rules governing student loans in the UK. It is argued that (a) the changes that were made during the last few years to the immigration rules that apply to non-EU immigrants have constantly been retrospective in nature; (b) these changes are in clear violation of the rule of law; and (c) some of these changes are unfair, while others are immoral and/or unconstitutional. It is also argued that the changes that were made in 2015 to the rules that apply to student loans are also retrospective; that some of them are either unfair or immoral – but none of them is unconstitutional.

For the purpose of this paper and within the context of RRM we use the terms 'fairness', 'morality' and 'constitutionality' in the following way: unfair RRM is one that results in relatively minor discomfort to its subjects. This can be the case where those who are subject to the retrospective rule are not significantly worse-off as a result, or because it is relatively easy for those who are subject to the retrospective rule to change their status or stop committing the relevant act – and by doing so to avoid the application of the new rule.

Immoral RRM is one that causes severe or significant harm to its subjects. This would be the case when those who are subject to the retrospective rule can't easily avoid its significantly harmful consequences – or in some cases – can't avoid it at all. We suggest that the difference between unfairness and immorality – within the context of RRM and for the purpose of this paper only – is that of degree. Unfairness entails non-significant harm whereas immorality entails a significant one. Lastly, when we classify RRM as either unfair or immoral we establish the starting point of the moral discourse rather than its conclusion. That is, an unfair RRM is prima-facie unfair – and would require justification to refute the judgment regarding its unfairness. Accordingly, an immoral RRM is prima-facie immoral – and would require much stronger justifications to refute the judgment regarding its immorality.

As to classifying RRM as unconstitutional, we assume, without elaborating on that point, that the rule of law is a constitutional principle in all democratic states, whether a certain state has a constitution which is its supreme legal norm – or whether the state has a political constitution that is not legally binding – as is the case in the UK.

II. RETROSPECTIVE RULE MAKING AND THE RULE OF LAW

The rule of law has many, often incompatible meanings. Here we subscribe to Joseph Raz's perception of the rule of law that concludes, in short, that the purpose of 'the law' is to guide people's behaviour – and that the rule of law is a set of requirements that must be met in order for the law to be able to achieve the purpose of guiding people's behaviour.[1] Some may argue that this is an incomplete perception of the rule of law, but any meaningful perception of the rule of law concludes that either one of the purposes of the rule of law – or its only purpose – is to allow the law's subjects to know what the law is and to act accordingly. This is why the rule of law requires, for example, that legal norms will be clear; that they will be published; and that the executive branch will not be allowed to ignore the law or pervert its purpose. This is also why the rule of law requires that legal norms will not apply retrospectively, as RRM fails, by definition, to guide people's behaviour.

III. RETROSPECTIVE RULE MAKING AND GUIDING PEOPLE'S BEHAVIOR

Retrospective rule making (RRM) is often described as 'legislation which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past'.[2] This common perception is only partly accurate as it ignores the complexity of RRM. There are in fact two types of RRM: RRM in the strong sense and RRM in the weak sense. In RRM in the strong sense we have a rule that changes the legal status or legal consequences of an act that was committed before the rule was created; or a rule that changes the legal status or legal consequences of a state of affairs that existed (and ceased to exist) before the rule was created. This is the common perception of RRM.

In RRM in the weak sense we have a rule that changes the legal status or legal consequences of an act that has started before the rule was created, yet this is an ongoing act that is still being committed in the present

[1] Joseph Raz, *The Rule of Law and its Virtue*, 93 L.Q.R. 195 (1977).

[2] DANIEL GREENBERG, CRAIES ON LEGISLATION: A PRACTITIONER'S GUIDE TO THE NATURE, PROCESS, EFFECT & INTERPRETATION OF LEGISLATIONE 432 (Sweet & Maxwell, 9th ed. 2008).

and continues into the future; or a rule that changes the legal status or legal consequences of a state of affairs that existed before the rule was created – and continues to exist after the rule was created.

The problem with RRM in the strong sense is that it always fails to guide people's behaviour. It changes the legal status or legal consequences of 'things' (acts or states of affair) that already happened and can't be changed or be undone. RRM in the weak sense is as problematic as RRM in the strong sense in cases where it is impossible, extremely difficult or exceptionally costly to stop committing an act or to change a state of affairs that started in the past and continues into the present and the future. Both types of RRM are in clear violation of the core of any perception of the rule of law – to the extent to which they prevent the law from achieving its purpose – guiding people's behaviour.

One may argue that more often than not the real problem with RRM in the weak sense is the content of the new legal rule rather than its retrospective application. If a local council, for example, decides to raise its council tax by 200%, then that would be an example of RRM in the weak sense as far as the new tax is imposed on all those who currently live within the local council's jurisdiction. The problem here, one may argue, is not with the retrospective application of the rule but rather with its content, which may seem unduly harsh. The new rule, it can be argued, does guide people's behaviour as those who are subject to the rule know what the rule means and can make an informed decision as to whether to continue living in that area or to move elsewhere. According to this view, the new rule still guides people's behaviour even if those who, for example, recently bought a house in that area would not have done so if they knew – at the time they bought their house – that the local tax would be raised by 200% a few years later. This view is misguided as it fails to appreciate what 'guiding people's behaviour' in fact means within the context of the rule of law. Reading Raz's perception of the rule of law leads to an inevitable (and justified) conclusion that the purpose of the law (guiding people's behaviour) should not be interpreted in a narrow way according to which the law guides our behaviour whenever we know what the law says – and can act accordingly. Rather, 'guiding people's behaviour' should be interpreted more broadly, in a way that describes the rule of law as the quality of the law that enables its subjects to make rational and well-informed long-term plans.
The view that RRM in the weak sense is often problematic because of its content rather than because of its retrospective application is misguided because it wrongly identifies the purpose of guiding behaviour with one specific requirement of the rule of law: the requirement that the law should be clear. This misguided view assumes that as long as the law is clear – it is capable of guiding people's behaviour. Vagueness in law is indeed a violation of the rule of law and it results in difficulties in guiding people's behaviour. Clear laws,

however, do not necessarily guarantee that the law would be able to guide people's behaviour effectively – or at all. If the law is clear but, for example, unstable i.e. changes too frequently, it fails to guide people's behaviour. Let us assume that Veida is a postgraduate student who considers starting her PhD studies in pursuit of an academic career. Let us also assume that when Veida started her PhD there was a law that stated that in order to be offered a full-time academic lectureship, one has to have a PhD and publish at least two academic articles. Shortly after Veida started her PhD studies, a new law changed the relevant requirements to publishing one book, two articles, and having two years of academic teaching experience. Frustrated by the change, Veida quits her PhD studies. A year later the law is changed again, abolishes the strict requirements and reinstates the previous ones. According to the narrow perception of the purpose of guiding people's behaviour, the above state of affairs does not present any difficulty with regard to the rule of law. But when Raz insisted that stability is one of the components of the rule of law, the above state of affairs is what he had in mind. Unstable laws do guide our behaviour in the narrow sense, as long as the ever-changing law is clear. Unstable laws do not guide our behaviour in the broad sense, because they prevent us from making rational and well-informed long-term plans – and that is, for Raz – a violation of the rule of law.

Same thing can be said about RRM in the weak sense. If we return to the council tax example above, we could argue that imposing the new tax on all residents does guide their behaviour as the new rule is clear and gives all residents two clear options: to pay the new tax or to move to another place. However, perceiving the purpose of guiding people's behaviour in a broader, more accurate way, explains why the new tax that is applied retrospectively (in the weak sense) violates the rule of law: it prevented all residents, especially new ones, from making rational and well-informed long-term plans. It is important to note what may seem obvious: the long-term plan to buy a house in that area could have been rational and well-informed at the time it was made. But this is beside the point. The point is that after introducing the new tax the once rational and well-informed plan has now become irrational and ill-informed – retrospectively affecting recent house buyers' ability to make rational long-term plans, thus failing to guide their behaviour and in fact retrospectively denying their autonomy.

IV. RETROSPECTIVE RULE MAKING: FAIRNESS, MORALITY AND CONSTITUTIONALITY

RRM in the strong sense always fails in guiding people's behaviour. RRM in the weak sense fails in guiding people's behaviour in cases where it is impossible or extremely difficult or costly to stop committing an act or to change a state of affairs that started in the past and continues into the present and the future. Before we move on to evaluate the fairness, morality or constitutionality of RRM in the weak sense, it is important to note that classifying a legal norm as retrospective in the weak sense (or the strong sense) does not entail making a conclusive moral judgment about the retrospective application of the rule. RRM in the weak sense means changing the legal status or legal consequences of an on-going act that has started before the rule was created; or changing the legal status or legal consequences of an on-going state of affairs that existed before the rule was created. This understanding of RRM in the weak sense is morally neutral. Put differently, there is nothing inherently wrong with RRM in the weak sense (or the strong sense). The morality or the constitutionality of RRM depends on other factors – on top of the retrospective application of the rule. The fact that the definition of RRM in the weak sense is morally neutral is subject to one general exception. RRM in the weak sense can sometimes be found in cases where it is impossible or extremely difficult or costly to stop committing an on-going act or to change an on-going state of affairs that started in the past and continues into the present and the future. In these cases, the RRM fails to guide people's behaviour. This failure is a violation of the rule of law and therefore needs justification. This failure means that RRM is almost always unfair (one possible exception would be cases where the RRM justly benefits its subjects). It does not necessarily mean, however, that RRM is always either morally flawed or unconstitutional. RRM changes the rules of the game after the game has already started. This should always create some discomfort for rule-makers and raise suspicions about 'unfair play'. But we need more than that in order to make a more serious claim about the morality or constitutionality of RRM, and for this paper's purposes – the morality or constitutionality of RRM in the weak sense.

Three questions should be asked in order to evaluate the fairness, morality or constitutionality of RRM in the week sense: (1) how severe the implications of the new rule are; (2) how difficult it is for those who are subject to the new rule to change an on-going state of affairs or on-going status, or to stop committing an ongoing act; (3) would those who are subject to the new rule have changed their behaviour or decisions in the past, had they known that at some point in the future the new rule would be introduced. This is, in short, the question of reliance. But here we do not only ask whether those who were subject to the

previous rule acted upon that rule or made their decision while relying on that rule. The question that we ask is slightly different. We ask whether they would have acted in the same if they knew that a new rule would be introduced in the future. A quick, silly example may clarify this distinction: let us assume that in 2015, and in order to encourage young people to get married, the government decided to pay £500 per year to any couple who will get married before the age of 23. Veida and Lisa were both 22 in 2015, had plans to get married sometimes in the future, but decided to get married promptly in order to get the generous government allowance. In 2017, the government reduces the allowance from £500 to £300 per year – and apply the change to all married couples who got married since 2015. Veida and Lisa relied on the previous rule. They would have not got married so promptly if the rule was not enacted. But the question we need to ask here is different. We need to ask whether Veida and Lisa would have got married so promptly if they knew in 2015 that in 2017 the allowance would be decreased to £300 per year (and here it is safe to assume that the answer would be 'yes').

Taking into account the three criteria mentioned above, we can now differentiate between three types of cases.

In Case 1, we have RRM that results in mild, relatively insignificant consequences, or – if it results in severe, meaningful consequences, it is relatively easy and not very costly to stop committing the relevant act or to change the state of affairs that started in the past and continues into the present and the future. In this case, the RRM is unfair, but not morally flawed or unconstitutional. This is presumably the case with regard to Veida and Lisa who now get £300 of government allowance per year instead of £500. The RRM in this case is unfair because it changes the rules of the game after the game already started. It is not immoral because the consequences of the RRM are not significant. It is also not unconstitutional, because Veida and Lisa would have got married in 2015 even if they knew that in 2017 the allowance would be reduced to £300 per year. In this case, the law did not fail to achieve its main purpose – guiding people's behaviour. Veida and Lisa have no real grievance here apart from being disappointed that things have changed for the worse.

In Case 2, we have RRM that results in severe, meaningful consequences, and where it is impossible, extremely difficult or exceptionally costly to stop an act or change a state of affairs that started in the past and continues into the present and the future. In this case the RRM is morally flawed, unless exceptional

reasons can justify it. In Case 2 we assume that even though the results of the RRM are severe, and that it is extremely difficult to stop the relevant on-going act or state of affairs, those who are subject to the new rule would not have changed their behaviour or decisions in the past, even if they knew that at some point in the future the new rule would be created. This type of RRM is still immoral, not because of its consequences but because of its motives and the message it conveys (when we can reasonably assume that this is indeed the case). In this type of RRM the rule-maker takes advantage of the fact that those who are subject to the new rule can't stop committing an on-going act or can't change an on-going state of affairs either at all or not without making meaningful sacrifices. The rule-maker uses this vulnerability to severely harm those who are subject to the new rule. In some cases, like in the case of non-EU immigration that will be described below, the rule-maker in fact treats those who are subject to the new rule as means to an end rather than as autonomous human beings. This is why RRM of type 2 is not merely unfair but also immoral, yet not necessarily unconstitutional.

In case of type 3, like the case of type 2, the RRM results in severe, significant consequences, and we also assume that it is impossible, extremely difficult or exceptionally costly to stop the relevant act or change the state of affairs that started in the past and continues into the present and the future. However, in cases of type 3 those who are subject to the new rule would have changed their behaviour or decisions in the past, had they known that at some point in the future the new rule would be created. This is why this type of RRM is not just unfair or immoral but also unconstitutional. In this case, more than in the previous cases, the RRM is in clear violation of the rule of law. It prevents the law from achieving its main purpose – guiding people's behaviour. It adversely and profoundly changes people's status, rights or entitlements (that resulted from an act that was committed in the past while relying on the previous rule) and without allowing those who are subject to new rule the possibility to avoid being subjected to the new rule (at least not without making meaningful sacrifices). It shows complete disrespect to people's autonomy and to the human need of making long-term life plans. It is this complete disregard to the rule of law and to the purpose of 'the law' (guiding people's behaviour) that makes this type of RRM unconstitutional.

Two test-cases can exemplify these three types of RRM: the rules that govern non-EU immigration to the UK and the rules that govern student loans in the UK.

V. NON-EU IMMIGRATION: THE LEGAL SCHEME – AND RETROSPECTIVE RULE MAKING

Here we focus our discussion – and examples – on applications for a work permit and applications for permanent residency in the UK (or – 'indefinite leave to remain'). We will analyse three cases: first, the introduction of annual salary threshold as a condition for residency in the UK; second, the constant increase in application fees; and third, the introduction of a 'non-EU employment charge'.

In 2012 the government introduced a few meaningful changes to its immigration rules – and to immigration application fees. The changes came into force on 6 April, 2012. In the statement of changes to the immigration rules it was stated that the rules changes in April 2012 will affect those who entered Tier 2 visa (work permit visa) under the rules in force from 6 April, 2011 and who will be eligible to apply for permanent residency from April 2016. [3]

To take one example, those who entered the UK in 2011 under a Tier 2 visa were allowed, under the then in force rules, to apply for residency after five years. In April 2012, however, the rules have changed and required applicants for settlement to meet a minimum annual salary threshold of £35,000. The practical implication was quite simple – and painful: those who entered the UK in 2011, under reasonable assumption that eventually they would be able to permanently stay in the UK, had to leave the UK by 2016 if the main applicant did not earn more than £35,000 per year (which is more than the average salary in the UK – currently £27,271).[4] This is RRM in the weak sense as it changes the legal implications of an on-going act that started in the past and continues into the future. The on-going act is living in the UK while holding Tier 2 visa. With regard to those who entered the UK under a Tier 2 visa before April 2012, the on-going act of living in the UK while holding Tier 2 visa started before the new rules were introduced. The new rules changed the legal implications of the relevant act (living in the UK). It changed the legal rights of those who started committing the relevant act before the rules came into force. The new rules,

[3] Statement of Changes to the Immigration Rules: HC1888, (March 15, 2012), https://www.gov.uk/government/publications/statement-of-changes-to-the-immigration-rules-hc1888-15-march-2012

[4] Chris Coles, *Annual Survey of Hours and Earnings - Office for National Statistics*, (Oct. 23, 2017), https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/annualsurveyofhoursandearnings/2016provisionalresults.

therefore, failed in guiding the behaviour of those who entered the UK before these new rules were enacted.

A second example is the changes made to the permanent residency application fees for non-EU migrants. These fees were changed from £1093 in 2014 to £1500 in 2015, and again to £1875 in 2016, and for a third time to £2297 in April 2017.[5] These changes always applied to those already living and working in the UK. A proper, fairer way of applying changes to application fees would be to apply them to those who enter the UK shortly after the change has been made. That would be prospective rulemaking that complies with the rationale of the rule of law. Applying changes in application fees to those who already immigrated to the UK and have been working there legally – but have not applied for residency yet – is another example of RRM in the weak sense.

A third – and for our purposes – last example is a relatively recent one. On 24 March 2016, the government has confirmed that it was pressing ahead with plans to reduce Britain's reliance on migrant workers through a new skills charge.[6] The Immigration Skills Charge that was introduced in April 2017 levies on employers that employ migrants (non-EU nationals) in skilled areas. Set at £1,000 per employee per year, and a reduced rate of £364 for small or charitable organizations, it is designed to cut down on the number of businesses taking on migrant workers and incentivize training British staff to fill those jobs. Here we are not going to challenge the stupidity of this new charge, its reasonableness or its ability to achieve its purpose. We will only focus on its retrospective nature.

If the new charges were applied with regard to employing future migrants, those migrants who will enter the UK from now onwards, it would have been a truly prospective rulemaking. The new charges, however, are yet another example of RRM in a weak sense. It changes the legal consequences (paying a new charge) of an on-going situation (migrants who live and work in the UK) that started in the past and continues in the present and into the future.

In all these three examples, the RRM does give its subjects a choice: earn £35,000 a year – or leave; pay the new, outrageously excessive application fee for permanent residency – or leave. Find an employer who is

[5] Home Office Immigration & Nationality Charges (Oct. 23, 2017), https://www.gov.uk/government/publications/visa-regulations-revised-table.
[6] The Immigration Skills Charge Regulations, 2017.

willing to pay £1000 a year as a fine for employing non-British or non-EU workers – or leave. This is, of course, not a real choice. People have a real choice, people are autonomous, when they have an adequate number of valuable options to choose from. In these examples, the UK government, by applying RRM, either denies migrants of any choice (one can't simply choose to earn more than £35,000 a year, or to find an employer who is willing to pay the 'employing non-British workers fine') – or forces migrants to 'choose' between leaving the UK or pay significantly more than they were planning to pay when arriving to the UK – in order to stay in UK permanently.

A decision to leave one's country, home and indeed previous life and immigrate to another country normally entails significant costs and at times irreversible and life-changing sacrifices. In the examples above, the RRM in a weak sense – and because it is retrospective – completely fails in guiding people's behaviour, diminishes their autonomy, disregards people's reasonable expectations and prevent them from making rational and well-informed long-term plans. Since the results of this RRM are severe (or may be severe under certain circumstances) and since it is extremely difficult to stop the relevant on-going act or state of affairs, this RRM is in fact immoral. But is it also unconstitutional? To answer this question we need to ask whether those migrants who now live and work in the UK would have decided not to migrate to the UK if they had a crystal ball and therefore knew, before migrating to the UK, about the future changes to the rules. If the answer is yes – we have a strong presumption of unconstitutionality that can be refuted only in exceptional cases where compelling reasons outweigh the legitimate interests of those who are affected by the RRM. If the answer is no – the RRM may well be unfair, unjust or immoral, but the presumption of unconstitutionality would be much weaker.

We argue that there is a strong presumption of unconstitutionality in cases where migrants would have decided not to migrate to the UK if they knew, before migrating to the UK, about the future changes to the rules. We also argue that the final decision with regard to the constitutionality of the RRM in these cases depends on whether there are compelling reasons for the RRM that outweigh the legitimate interests of those who are affected by it. This means that a constitutional balancing test should be applied in order to decide the constitutionality of the RRM in these cases. The proportionality test, a well-established constitutional balancing test, can be of assistance here.[7] We will refer to the proportionality test in its most

[7] Since the Human Rights Act 1998 came into force in the UK and required UK courts to apply the proportionality test with regard to protected rights, there has been an ongoing and fierce academic dispute about whether the proportionality test should

common version, and as a four-stage test which includes: (1) legitimate aim, (2) suitability (or rational connection); (3) necessity (or applying the least intrusive measure); and (4) proportionality in the narrow sense (or proportionality stricto sensu).[8]

Firstly, we consider the possible justification for introducing a salary threshold of £35,000 a year for non-EU migrants. The then Home Secretary Theresa May said the reasoning for the change is to help cut the number of non-Europeans and their dependants granted permanent residency each year from 60,000 to 20,000. For our purposes we will assume that this is a legitimate aim, i.e. an aim of a kind that can justify imposing limits on rights or legitimate interests. As to the suitability test, it is quite clear that increasing the salary threshold is likely to achieve its aim – reducing the number of non-Europeans and their dependants granted residency each year. With regard to the necessity test, here we ask whether the government could have taken less intrusive measures which would still be equally effective in achieving the aim of reducing the number of non-Europeans granted residency each year. It is safe to assume that there are no such measures. We are left with the final stage of the proportionality test where we ask whether the objective to reduce the number of immigrant residents is a sufficiently important justification for the violation of the rule of law and for harming people's important and legitimate interests. We argue that the RRM in this case is disproportionate. The retrospective change prevented those who already moved the UK from making an informed decision as to whether to immigrate to the UK. The change frustrates legitimate expectations of those who have already moved to the UK, before the new rule was introduced, in the hope to become residents after 5 years. Those who moved to the UK while having no prospects of earning more than £35,000 a year would not have made this life-changing decision had they known that this new restriction would be introduced in the future. These people can't merely decide to earn £35,000 a year and are therefore being forced to leave the UK, while being vulnerable and exposed to numerous financial, psychological and other severe implications. The severity of the harm caused to thousands, perhaps tens of thousands people and the gross violation of the rule of law in this case can't possibly be justified by the wish to cut the number of non-Europeans granted residency each year, especially when this aim could have

(or even can) be a general ground of judicial review in public law. Here we assume, without trying to protect this argument, that the proportionality test can and should be used in our case as well.

[8] This four-stage test was adopted and applied in Bank Mellat v. HM Treasury [2011] EWCA Civ 1; [2011] 2 All E.R. 802, paras 68–76 (Lord Reed). For recent, excellent and in-depth discussion of proportionality in public law see Aharon Barak, Proportionality: Constitutional Rights & Their Limitations (Cambridge University Press, 2012); Moshe Cohen-Eliya & Ido Porat, Proportionality and Constitutional Culture (Cambridge University Press, 2013); Grant Huscroft et al, Proportionality and The Rule of Law: Rights, Justification, Reasoning 311 (Cambridge University Press, 2014).

been achieved, in part, if the change to the rule applied in a prospective way, to those moving to the UK after the rule was changed.

Within the context of the proportionality test, it is also worth noting that RRM always results in uncertainty which is itself a violation of the rule of law. Legal rules are always changing and one normally can't expect that a certain rule will not change in the future, but in many cases we do have legitimate expectation that rules will not be changed retroactively. The practice of RRM, as exemplified in our case, did not only severely harm those who were already living in the UK at the time the change was introduced, but it also prevents those who are considering to move to the UK from making informed decisions about their long-term life plans. Think about those who consider immigrating to the UK in the near future. They know that in order to be granted residency they will have to earn £35,000 a year. However, being aware of the British habit of changing immigration rules retroactively, they can't be certain that this threshold will not be increased, perhaps significantly, after they move to the UK, thus perhaps forcing them to change their recently decided long-term life plan. Ironically, this effect of the RRM in our case in fact helps the government in achieving its aim – reducing the number of non-EU immigrants. At the same time, however, this side-effect strengthens our argument that the RRM in our case is disproportionate, as its aim is not sufficiently weighty to justify the harm that is caused to immigrants who already live in the UK, to potential immigrants – and to the rule of law.[9]

The proportionality test can also be applied to assess the justifications for the changes of the residency application fee. These fees had been changed from £1,093 in 2014 to £1,500 in 2015, then to £1,875 in 2016 and again to £2,297 in April 2017.[10] The obvious purpose of these changes was to deter immigrants from applying for permanent residency thus encouraging them to leave the UK after a stay of five to six years. Other aims that were publicly expressed are relieving the pressure put upon the immigration department, which have suffered budget cuts; reducing the costs of funding public services such as the

[9] There is another problem of uncertainty in our case, as the new rule that sets the £35,000 salary threshold is not clear as to how it would apply to cases where, for example, an immigrant decided to work part-time for a while, was unemployed for a while, earned less than the threshold just before submitting the application for residency, is likely to earn more than the threshold shortly after applying for residency, etc. The rule is not sensitives to special circumstances and to numerous possible changes of circumstances, and therefore results in inevitable uncertainty. However, since this problem results from the rule itself rather than from it retrospective application, we will not elaborate on this point here.

[10] *Supra* note 5.

NHS and schools,[11] and generally prioritising British citizens.[12] Applying the proportionality test to this case, by focusing on the aim to reduce the number of applications for residency, will find that the aim can be perceived as legitimate; that the measures taken were suitable as it is likely that they will achieve their aim (at least in part); and that the measures were necessary in order to achieve the legitimate aim.[13] However, and much like in the previous case, this RRM is disproportionate as the aim of reducing the number of applications for residency is not sufficiently weighty to justify the harm that is caused to those who are subject to the RRM – and to the rule of law. To take one example, a family of four who immigrated to the UK in 2014, expected to pay £4,372 as application fees when they apply for residency six years later. Only three years later, in 2017, the fees were increased to £9,188. This increase applies retroactively to the family who immigrated to the UK in 2014. This RRM is disproportionate for the reasons mentioned above. It is also immoral because its consequences are meaningful and because discontinuing the immigrants' on-going situation (living in the UK) requires significant sacrifices. The question, however, of whether this immoral and disproportionate RRM is also unconstitutional is more complicated. As we argued above, RRM is unconstitutional only in cases where those who are subject to the new rule would have changed their behaviour or decisions in the past, had they known that at some point in the future the new rule would be created. The question here, therefore, is whether the family of four who immigrated to the UK in 2014, expecting to pay £4,372 as application fees when they apply for residency six years later, would have still immigrated to the UK had they known that eventually they will have to pay £9,188 instead. The answer to this question is case-sensitive, perhaps speculative, and that alone may result in a conclusion that even though the RRM in this case is unfair, immoral (and cynical), it is probably – and just barely – constitutional.[14]

The reasoning presented above – and its conclusions – apply in a very similar way to the case of the new Immigration Skills Charge that was introduced in April 2017, levies on employers that employ migrants

[11] *PM: Immigration Target Still Important,* BBC NEWS (Oct. 23, 2017), http://www.bbc.co.uk/news/uk-politics-39840503.

[12] Amelia Hill, *Home Office Makes Thousands In Profit On Some Visa Applications*, THE GUARDIAN (Oct. 23, 2017), https://www.theguardian.com/uk-news/2017/sep/01/home-office-makes-800-profit-on-some-visa-applications?CMP=Share_iOSApp_Other.

[13] Statistic shows 28% decrease in the number of people granted permission to stay permanently in the year ending March 2017 compared to the previous year but it will be too quick attributing this change to increase in the application fee. It is also worth noting that most people who arrived to the UK on a family visa intended to stay in the UK indefinitely.
National Statistics: How Many People Continue Their Stay in the UK, (Oct. 17, 2017), https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2017/how-many-people-continue-their-stay-in-the-uk.

[14] The question of whether the RRM in this case can be constitutional with regard to some immigrants and unconstitutional with regard to others is a complex one and will not be discussed here.

(non-EU nationals) in skilled areas £1,000 per employee per year. The aim of the new rule is to incentivise employers to invest in British staff – and to use the new charges to address skills gaps in the UK.[15] This may be perceived as a legitimate aim and we are willing to assume that the new charge will achieve that aim – and that these measures are necessary for achieving that aim. Yet, the RRM is still disproportionate for all the reasons mentioned above with regard to the retrospective application of the ever increasing application fees. For the same reasons – this RRM is unfair and immoral but not necessarily unconstitutional.

A slight legal complication can be found in the 'governing norm' of all immigration rules. This norm states that 'the Immigration Rules are subject to change and applicants must see the requirements in place at the time they make their application to settle'.[16] Put differently, the Government saves the right (or the power) to apply its immigration rules retrospectively – i.e. to people who already immigrated to the UK and work there legally. The Government in fact states that its immigration rules are not subject to the rule of law. We suggest, without elaborating on this point, that the government has no such power. In short: in a democratic state, the government is bound by the law. Its powers are created and allocated by the law. The purpose of that law is to guide people's behaviour. For the law to achieve its purpose – it has to be prospective (subject to exceptional circumstances). Government, which is created by the law and is subject to the law, can't assume the authority to frustrate the very purpose of the law. It can't assume the authority to violate the rule of law. It can't assume the authority to enact retrospective rules if it results in a complete failure to guide people's behaviour (subject to exceptional circumstances). Therefore, the governmental statement that 'the Immigration Rules are subject to change and applicants must see the requirements in place at the time they make their application to settle', is in fact ultra-vires, has no legal effect, and can't 'legalise' disproportionate and illegal RRM.

VI. STUDENTS' LOANS & RRM

In 2012 the UK Government made significant changes to the student finance system: tuition fees for full-time undergraduate degrees were raised to £9,000 per year; the loan repayment threshold was raised to £21,000 and would increase in line with average earnings periodically (a promise that was made but was

[15] *Government's New Immigration Skills Charge to Incentivize Training of British Workers*, (Oct. 19, 2017), https://www.gov.uk/government/news/governments-new-immigration-skills-charge-to-incentivise-training-of-british-workers.
[16] *Statement of intent: Changes to Tier 1, Tier 2 and Tier 5 of the points based system; overseas domestic workers; and visitors,* HOME OFFICE (Oct. 19, 2017), https://www.gov.uk/government/uploads/system/.../tiers125-pbs-overseas-soi.pdf.

not included in the relevant legislation); and a new variable, tiered rate of interest was introduced for student loans. The relevant booklet for students starting courses in September 2012 stated that 'the regulations may change from time to time and this means the terms of your loan may also change'.[17]

Subsequently, in 2015 the Government announced in the Spending Review that it had decided to freeze the repayment threshold for all post-2012 loans until at least April 2021. Their aim was to ensure that graduates will pay back their loan quicker than planned, all the while enabling the government's long term costs of student loans to remain affordable.[18] This is another example of RRM in the weak sense, but with a twist. Here, the legal rule has not been changed. Government merely went back on its promise to increase the loan repayment threshold in line with average earnings.

This retrospective change to student loan repayments fails to give its subjects a choice but to continue repaying their loans. The decision to study an undergraduate degree and take out a government loan is an irreversible, life-changing decision. Freezing the threshold leaves more than two million graduates that had taken out a loan after 2012 paying £306 more each year by 2020-21 if they earn over £21,000,[19] and will result in students repaying their loan much quicker than expected.

Here we need to ask whether those who took out a student loan after 2012 would have done so had they known that this particular rule would change in the future. The answer here is probably yes. It is unlikely that an extra cost of £306 per year would have deterred anyone from deciding to read for an undergraduate degree. The RRM in this case is perhaps still unfair, because even though it is impossible for those who are subject to the RRM to change the relevant state of affairs that started in the past and continues into the future (being a student and then a graduate), the RRM results in mild, relatively insignificant consequences. If, for some students, an extra cost of £306 per year is significant after all, then with regard to their case the RRM will also be considered immoral. However, it will be extremely difficult to argue against the constitutionality of the RRM in this case, as presumably all students would not have changed their past

[17] Sue Hubble & Paul Bolton, *Freezing the Student Loan Repayment Threshold* (Briefing Paper No 7653, July 12, 2016) House of Commons Library.
[18] Patrick Collinson, *Mps to Debate Student Loan Costs after Petition*, THE GUARDIAN (Oct. 23, 2017) https://www.theguardian.com/money/2016/jun/29/mps-to-debate-student-loan-costs-after-petition-graduates (accessed 23 October 2017); Hubble & Bolton *supra* note 1, at 12.
[19] Patrick Collinson & Miles Brignall, *Government under Pressure over Student Loan Change,* THE GUARDIAN (Oct. 22, 2017), https://www.theguardian.com/money/2016/jun/04/government-under-pressure-over-student-loans.

decision to study for an undergraduate degree even if they knew that at some point in the future their repayments would increase by £306 per year.

CONCLUSION

In this note we evaluated the fairness, morality and constitutionality of a few cases of RRM in the UK with regard to rules of immigration and the student loan scheme.

As to the student loan scheme we found that the RRM was perhaps unfair but not immoral or unconstitutional. Things are different though with regard to the British practice of amending its immigration rules retroactively.

During the past few years, UK government has been constantly changing its immigration rules in a retrospective manner. Many of these changes made migrant already living in the UK worse-off. Many of the changes were applied to those who already live and work in the UK – treating them as 'captive audience', completely denying their autonomy or facing them with a choice between bad options and even worse ones. Many of these changes are ultimately in gross violation of the rule of law. The constitutionality of this RRM is doubtful. Its immorality and unfair nature is indisputable. In the field of immigration policy, this is what has become of Great Britain: a country that applies doubtfully constitutional, yet unarguably heartless and immoral retroactive changes to its immigration rules, making Great Britain a great, repetitive violator of the rule of law, the principle without which no democracy can exist.

While states should be relatively free to decide their immigration policy and while we refrained from evaluating the wisdom or reasonableness of the British immigration policy and the wisdom or reasonableness of the rules discussed above, we do argue that states should normally refrain from applying their laws retroactively – even when the RRM is in the 'weak' sense. We also argue and that the retroactive application of some of the immigration rules in the UK is clearly immoral and in some cases perhaps also unconstitutional. The case of RRM exemplifies the fine line that exists between mere constitutionality and morality. A just state should aspire to apply moral policies rather than policies that are barely constitutional. With regard to its immigration policy, and within the context of RRM, the UK has very few reasons to be proud of its moral stance.