Two Types of Retrospective Rule Making, the Rule of Law, and UK Immigration Policy

ABSTRACT

This paper submits 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 situation that existed - and ceased to exist - before the rule was created. 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 situation that existed before the rule was created – and continues to exist after the rule was created. Both types of RRM can be equally immoral – and violate the rule of law to a similar extent. The case of the rules governing non-EU immigration to the UK is used as a test case of RRM in the weak sense that is morally indefensible and legally questionable.

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. RRM in the weak sense, although underexplored in comparison to what we call RRM in the strong sense, can be equally immoral, and equally undermine the rule of law. This paper will define RRM in the weak sense, explore its morally suspicious nature and effect – mostly in light of the rationales of the rule of law, and will offer criteria for deciding the morality of RRM in the weak sense and its compatibility with the rule of law.

We continue by analysing one notable example that illustrates both the meaning of RRM in the weak sense, and our proposed framework for determining its morality: we consider the rules governing non-EU immigration to the UK and argue that the changes that were made from the 2010s onwards are an example of RRM in the weak sense, with some of these changes being morally indefensible and legally questionable.

RRM in the Strong Sense and RRM in the Weak Sense

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'.[1] 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 situation that existed (and ceased to exist) before the rule was created. This is the common perception of RRM. An example of RRM in the strong sense would be a general legal norm that changes council tax rates and applies the change retroactively to previous years.

The other type of RRM is RRM in the weak sense. It builds on a distinction already made by Driedger between "retroactive" rule making (i.e., a statute 'that changes the law as of a time prior to its enactment') and "retrospective" rule making (i.e., a statute that 'is prospective, but it imposes new results in respect of a past event').[2] Our conception of RRM in the weak sense goes further: here 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 situation that existed before the rule was created – and continues to exist after the rule was created. Driedger's definition of "retrospective" is narrower than our conception, as it excludes situations where the event is ongoing.[3] We suggest that "retrospective" should be read more broadly to include ongoing acts, as excluding them ignores the fact that changing the legal effect or status of them, may be similarly immoral, or may similarly fail to guide people's behaviour, and thus be in violation of the rule of law. This will be evidenced by the examples explored later, but to continue the example given above – RRM in the weak sense would be a general legal norm that changes council tax rates and applies the change from the moment the legal norm is enacted (or at some point thereafter) – yet the change is applied to those who were already home owners at the time where the new legal norm was

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1 Daniel Greenberg, *Craies On Legislation: A Practitioner's Guide To The Nature, Process, Effect And Interpretation Of Legislation* (9th edn, Sweet & Maxwell 2008) 432.

2 Elmer A. Driedger, 'Statutes: Retroactive Retrospective Reflections' (1978) 56(2) Can Bar Rev 264, 268, 276.

3 ibid 273.

enacted. Regardless of whether the retrospective application of the new rule is justified, it is still RRM, though in the weak sense.

By describing RRM in the weak sense as we suggest here, we reject the idea that a broad definition of RRM, such that it captures RRM in the weak sense, is too broad or inadequate because it renders almost all laws as retrospective.[4] This incorrectly conflates retrospectivity as a descriptor with its consequences or moral permissibility. Put differently, the term retrospective has become synonymous with 'invalid' or 'ultra vires' or simply unjust. Our broad definition more accurately describes how laws often do have a retrospective nature, but that does not equal invalidity or immorality by default. It merely requires us, or public authorities, including the legislature, to be aware of the retrospective application of a legal norm, appreciate that it may be unjust, and then carry the burden of justifying it. Said burden results from the fact that both types of RRM fail to achieve the purpose of the law as law – guiding people's behaviour, thus are in violation of the rule of law, a violation that can sometimes be justified and therefore should be justified. Before describing how exactly RRM, including RRM in the weak sense, runs against the rule of law, a brief clarification about the meaning of the rule of law and its purpose is needed.

The Rule of Law – and Two Meanings of Guiding People's Behaviour

The main problem with RRM, either in the strong sense or in the weak sense, is that it fails to guide people's behaviour, either completely or to a meaningful extent. It is that failure that requires clarifying the link between RRM and the rule of law. Before doing so, we need to better understand what the rule of law means – and entails. More specifically, we need to better understand what we mean when we say that the purpose of the rule of law is to allow the law to guide people's behaviour.

The rule of law has many, often incompatible meanings. The purpose of this paper is not to compare different perceptions of the rule of law – and justify subscribing to one of them. Instead, 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

[4] Charles Sampford, *Retrospectivity and the Rule of Law* (OUP 2006) 19; John Prebble and others, 'Legislation with Retrospective Effect, with Particular Reference to Tax Loopholes and Avoidance' (2012) 2(2) VUWLRP 17, 25.

requirements that must be met in order for the law to be able to achieve the purpose of guiding people's behaviour.[5]

The rule of law according to Raz stipulates, inter alia, that laws must be open, clear, and relatively stable, otherwise they will not be "good" laws in the sense that they will fail achieving their purpose – guiding people's behaviour. 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, as will be elaborated further below.[6] Raz's perception of the rule of law deliberately ignores the content of the law. The content of the law can be unjust or immoral, yet as long as the law is open, clear, relatively stable and prospective (amongst other requirements which are of less relevance here) – the law still adheres to the rule of law. Accordingly, when Raz includes the 'principles of natural justice' in his perception of the rule of law, he only refers to procedural natural justice that includes, inter alia, open and fair hearing and absence of bias, which are essentials for the correct application of the law – regardless of its content.

Some may argue that Raz's perception of the rule of law is incomplete, perhaps too narrow. We do not need to reply to this argument here, nor do we need to fully engage with Raz's perception of the rule of law or to justify subscribing to said perception, because (a) our discussion here assumes, without aiming to justify this assumption (as that is not the purpose of the paper), that allowing the law to guide people's behaviour is the main (or only) purpose of the rule of law; and (b) any other meaningful perception of the rule of law, be that "substantive", "formal", "institutional", narrow or broad, concludes that either one of the purposes of the rule of law – or its only purpose – is to allow the law to guide people's behaviour, i.e., to allow the law's subjects to know what the law is and to act accordingly. Another reason why we do not need to justify our methodological decision here to focus on Raz's perception of the rule of law or to compare it to other common and influential perceptions of the rule of law, is that the components of the rule of law, as understood by Raz, and at least the ones that are relevant to our discussion here (most notably – the requirement for clear, stable, and prospective laws), can also be found in all other common understandings of the rule of law. Put differently, all meaningful and influential perceptions of the rule of law include the

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5 Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195. See also for a revised version of this classic paper: Joseph Raz, 'The Law's Own Virtue' (2019) 39 OJLS 1.

6 The law, according to Raz, also requires that the making of particular laws (particular legal orders) should be guided by open, stable and general rules; a conclusive court judgment according to the law; that the principle of natural justice will be observed; that courts should have review powers over the implementation of other principles; that courts should be easily accessible; and that the discretion of the crime preventing agencies should not be allowed to pervert the law: Raz 1997 ibid.

elements that Raz sees as part of the rule of law. Whatever these perceptions add to Raz's perception of the rule of law is of no relevance to our discussion here.

It is indisputable that one of the purposes of the rule of law, or its only purpose, is to guide people's behaviour. There is, however, either misunderstanding or disagreement as to what "guiding people's behaviour" actually means or entails.

Reading Raz's perception of the rule of law leads to the conclusion that the purpose of the rule of law, i.e., allowing the law to guide people's behaviour, should not be interpreted in a narrow way whereby the law guides our behaviour merely by us knowing what the law says. Rather, guiding people's behaviour, according to Raz, should be interpreted more broadly in a way that describes the rule of law as the characteristic of the law that enables its subjects to make rational and well-informed long-term plans, thus, so we argue, enabling its subjects to be more autonomous. Though Raz does not refer to the principle of autonomy in his writings on the rule of law, in his revised view of the rule of law, from 2019, Raz says that:

> '… governments… are subject to norms whose stability and predictability are essential for the well-being of individuals. The rule of law consists of principles that constrain the way government actions change and apply the law – to make sure, among other things, that they maintain stability and predictability, and thus enable individuals to find their way and to live well.'[7]

Describing the rule of law as a set of requirements that concerns people's 'well-being' and allows people to 'find their way and to live well', echoes Raz's perception of autonomy.[8] Autonomy, according to Raz, implies that (i) people have minimal rationality (i.e., they are able to set goals and comprehend the means of achieving those goals); (ii) people have an adequate range of valuable options from which they are able to choose; and (iii) people are appropriately independent while exercising those choices (i.e., that they are free from outside determination, manipulation and coercion).[9] Raz's perception of autonomy goes far beyond the purpose of the rule of law (and the purpose of this paper) but it is worth noting that for Raz, an autonomous person is one who is a part author of one's life. Being a part author of one's life is

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7 Raz 2019 (n 5) 2.

8 ibid.

9 Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) chs 14-15; Joseph Raz, 'Autonomy, Toleration and the Harm Principle' in R Gavison (ed), *Issues in Contemporary Legal Philosophy* (OUP 1987) 313.

not much different from being a person who is able to 'find her way and live well' for the sake of her well-being, which is, according to Raz, goods that can be secured by rule of law.

The link between RRM, the rule of law, guiding people's behaviour, and people's well-being and autonomy, clarifies a nuanced point that will ground much of the discussion below: if following the rule of law may enhance autonomy, well-being, and our ability to 'find our way and live well', then the rule of law, even according to Raz, is either a moral virtue of the law or simply morally good. In his influential article from 1977, Raz indeed argued that '[t]he rule of law is an inherent virtue of the law, but not a moral virtue as such'.[10] In his 2019 paper, however, Raz did not repeat this statement. By reading Raz's revised understanding of the rule of law, one can only conclude that this omission was well thought through. Raz's updated view, to which we fully subscribe, is more nuanced. According to this view, adherence to the rule of law may enhance our well-being and our ability to 'find our way and live well' (all other things being equal). Adherence to the rule of law, according to Raz, also enhances accountability and decreases the likelihood of being governed by an arbitrary government.[11] These are all, undeniably, moral goods.

Raz concludes by saying that 'the rule of law protects us from arbitrary use of legal power, and from similar abuses of legal power. That makes it a moral doctrine of great importance'.[12] That is a shift in Raz's view of the rule of law, yet it seems that Raz still insists, and rightly so, that the rule of law is not *inherently* morally valuable, in the sense that having more of it is not necessarily morally better than having less of it. Much also depends on the content of the law, which is still not part of Raz's definition of the rule of law. In his 2019 article, Raz still holds that the rule of law 'does not guarantee that the law is good or just',[13] and that 'a legal system that conforms to the rule of law principles offered can nevertheless be unjust or fail in some other significant way, e.g., it can fail to respect some human rights'.[14] Lastly, Raz reiterates his previous view that 'sometimes action in breach of the rule of law can in fact serve the interests of the governed well… The rule of law is an important moral doctrine. But on occasion its violation may be morally justified'.[15] This view informs our argument about RRM, including

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10 See also in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) 227.

11 Raz 2019 (n 5) 8; 5-7.

12 ibid 15.

13 ibid 9.

14 ibid.

15 ibid 14; There is much to be said about how Raz's revised understanding of the rule of law is different from Fuller's description of the rule of law: Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969) 38-39, 41. In short: Fuller's components of the rule of law are very similar to Raz's, yet fuller insisted that the components of the rule of law make up an inner or internal morality of

RRM in the weak sense. The argument is therefore that: (a) RRM in the weak sense may be a violation of the rule of law; (b) the rule of law is a moral doctrine in the sense that adherence to the rule of law is likely to result in moral goods – regardless of the content of the law; (c) a violation of the rule may be morally justified; and (d) RRM in the weak sense is always morally suspicious, but at times can be morally justified.

Now that the meaning of the rule of law to which we subscribe is clear, we can better describe the exact way in which RRM of both types, and especially RRM in the weak sense, fails to guide people's behaviour.

RRM, Clarity, Stability, and Guiding People's Behaviour

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 acts or situations that already happened and cannot be changed or undone. RRM in the weak sense, however, does not always fail to guide people's behaviour. It does fail to guide people's behaviour, and it is as problematic as RRM in the strong sense, mostly in cases where it is impossible, extremely difficult, or exceptionally costly to stop committing an act or to change a situation that started in the past and continues into the present and the future – and when those who are subject to the new rule wish to do exactly that – or when there is reliance, in the sense that will be described below. Both types of RRM are therefore 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, unlike the case of RRM in the strong sense, the real problem with RRM in the weak sense is often 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, rather than on new residents or homeowners only. The problem here, one may argue, is the content of the rule, which may seem unduly harsh. It can also be argued that the new rule does guide people's behaviour, as those who are subject to the rule know what the rule says, and can now 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 had they known at the time they bought

law. Here, suffice it to say that even though Raz disagreed with this observation in his 1977 article, his 2019 article (see n 5), brings Raz fairly close to Fuller's view.

their house that the council 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. It fails to appreciate Raz's view above, according to which one of the purposes of the rule of law is to allow the law to guide people's behaviour – in order to enhance their well-being and allow them to 'find their way and live well'. Guiding people's behaviour in this thick, broad sense is only meaningful when it allows people to make long-term and well-informed plans. This goes far beyond the thin and unsatisfactory understanding of the "guiding people's behaviour" rationale, one that merely entails understanding what the law says and being able to act accordingly.

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 a different 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 and its demands are realistic – it is capable of guiding people's behaviour. Vagueness in law is indeed often (but not necessarily) a violation of the rule of law, and it may result in difficulties regarding 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. Such is the case also when the law is clear but retrospective in the weak sense. The following example will clarify the distinction between the following demands of the rule of law: clarity, stability, and prospectivity. It will also clarify how they relate to the purpose of the rule of law – allowing the law to guide people's behaviour.

Let us assume that Beatriz is a postgraduate student who considers starting her PhD studies in pursuit of an academic career. Let us also assume that when Beatriz started her PhD there was a law (or general policy) that stated that in order to be offered a full-time lectureship, one must have a PhD and publish at least two academic articles. Shortly after Beatriz started her PhD, a new law changed the requirements to publishing one book, two articles, and having two years of academic teaching experience. That is RRM in the weak sense. Even though it only applies to future academic appointments (and is therefore not RRM is the strong sense) it changes the rules of the game regarding those who already started playing the game, i.e., started their academic journey towards securing an academic post. Frustrated by the change, Beatriz quits her PhD, as the prospects of securing an academic post at the end of her studies seem quite slim. A year later the law is changed again, abolishes the strict requirements, and reinstates the

previous ones. According to the narrow, thin perception of the purpose of guiding people's behaviour, the above situation does not present any difficulty regarding the rule of law, as the law was always clear. However, when Raz insisted that stability and prospectivity are two of the components of the rule of law, the above situation is what he had in mind. Unstable and/or retrospective laws in the weak sense do guide our behaviour in the narrow sense, as long as the ever-changing law is clear. Unstable and/or retrospective laws in the weak sense 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. Note that in the example above, if the law was changed only once, then we would not have a problem regarding its stability (nor with its clarity). Yet the problem of RRM in the weak sense would have remained, and that alone would be a violation of the rule of law – and a failure of the law regarding guiding people's behaviour.

Returning 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 the law on the matter is relatively stable. The new rule gives all residents two options: pay the new tax or 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 those who recently moved into the area, 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.

The Morality of RRM in the Weak Sense: The Relevant Moral Considerations

As noted above, 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 situation that started in the past and continues into the present and the future – and when there is reliance. Before we move on to evaluate the morality of RRM in the weak sense, it is important to reiterate that classifying a legal norm as retrospective in either the weak or strong sense, does not entail making a conclusive moral judgment about the retrospective application of the rule. Classifying a rule as

retrospective is either morally neutral or no more than morally suspicious. There is nothing which is inherently morally wrong with RRM either in the weak sense or the strong sense – in the same why that there is nothing which is inherently morally wrong with violating the rule of law. The morality of RRM depends on other factors – on top of the retrospective application of the rule.

RRM in the weak sense 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 (and possibly legality) of RRM. Four questions should be asked in order to evaluate the morality of RRM in the weak 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 ongoing situation or ongoing 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; and (4) the public interest in the retrospective application of the rule. This last consideration will not be discussed here but will be applied when the case of non-EU immigration to the UK is discussed.

Considerations 1 and 2 are quite clear, but consideration 3 requires clarification. The third consideration, where we ask whether 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 introduced, is, in short, the question of reliance. But here we do not only ask whether those who were subject to the previous rule actually 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 way 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 2023, 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. Sam and John were both 22 in 2023, had plans to get married sometime in the future, but decided to get married promptly in order to get the generous government allowance. In 2026, the government reduces the allowance from £500 to £300 per year – and applies the change to all married couples who got married since 2023. That is RRM in the weak sense. Also, Sam and John relied on the previous rule. They would have not gotten married so promptly if the rule was not enacted. But that is not the kind of reliance to which we refer in the third consideration above. The question we ask here is different. We ask whether Sam and John would have got married so promptly if

they knew in 2023 that in 2026 the allowance would be decreased to £300 per year. Here we assume that the answer would be "yes". If that is so, then the RRM (in the weak sense) is not morally problematic, also because there was no reliance, as we perceive it. With no reliance, no problem regarding guiding people's behaviour is being caused by the RRM.

Taking into account the first three criteria mentioned above, we can now differentiate between three types of cases of RRM in the weak sense.

In type 1, we have RRM in the weak sense 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 situation that started in the past and continues into the present and the future. Under these assumptions, there is no reliance as understood above. In this case, it will be relatively easy to justify the RRM. This is presumably the case regarding Sam and John who now get £300 of government allowance per year instead of £500. The RRM in this case is perhaps a bit unfair because it does change the rules of the game after the game already started and because it goes back on a representation made to those who acted on it. Yet it is not immoral because the consequences of the RRM are not significant and because there was presumably no reliance. In fact, it can be argued that in this case, the RRM in the weak sense is not a violation of the rule of law, because no problem regarding guiding people's behaviour can be identified. Sam and John would have probably got married in 2023 even if they knew that in 2026 the allowance would be reduced to £300 per year, i.e., there was no reliance on the rule. In this case, the law did not fail to achieve its main purpose – guiding people's behaviour, and did not diminish its subjects' autonomy. Sam and John have no real grievance here apart from being disappointed that things have changed for the worse, which is something that should generally be expected regarding public policies and general legal rules.

In type 2, we have RRM in the weak sense that results in severe, meaningful consequences, and where it is impossible, extremely difficult, or exceptionally costly to stop an act or change a situation that started in the past and continues into the present and the future. In type 2 RRM in the weak sense we assume no reliance. Yet we argue that this type of RRM can still be morally flawed, unless compelling reasons can justify it. In type 2, we assume that even though the results of the RRM are severe, and that it is extremely difficult to stop the relevant ongoing act or situation, 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 in the weak sense does not fail to guide people's behaviour, does

not necessarily undermine their autonomy, and is therefore not in breach of the rule of law – or its rationales.

Yet this type of RRM may still be immoral, under certain circumstances, because of its possible motives and the message it may convey. In this type of RRM, and if the new retrospective rule applies to a distinct group rather than to the general public, then the rule-maker takes advantage of the fact that those who are subject to the new rule are "captive subjects", i.e., they cannot stop committing an ongoing act or cannot change an ongoing situation either at all, or not without 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 to the UK that will be described below, the rule-maker in fact treats those who are subject to the new rule as means to an end, which may make them feel less worthy, and may rightly result in negative sentiments that goes beyond mere disappointment or discomfort. This may render type 2 RRM in the weak sense immoral. Further, type 2 RRM conveys the message that the generally legitimate expectations that the rules of the game should not be changed in the middle of the game, can be disregarded where convenient or where it is impossible, extremely difficult, or exceptionally costly for the subjects of the law to stop an act or change a situation that started in the past and continues into the present and the future. This type of RRM in the weak sense is perhaps unusual, but not rare. The case of non-EU immigration to the UK discussed below will demonstrate its complexity, nuances – and importance.

In type 3, the RRM in the weak sense 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 situation that started in the past and continues into the present and the future. In type 3, and unlike type 2 above, there is also reliance: 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. 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, duties, rights or entitlements, without allowing those who are subject to the new rule the possibility to avoid being subjected to it, 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 that gives rise to a strong presumption of immorality. As we later argue, this presumption can be refuted

only in exceptional cases where weighty reasons outweigh the legitimate interests of those who are affected by the RRM, i.e., where the new rule satisfies the proportionality test.

The example of the rules that govern non-EU immigration to the UK helps to better understand the types of RRM in the weak sense as discussed above.

RRM in the Weak Sense and Non-EU Immigration to the UK: Moral Considerations

Here we focus our discussion on applications for permanent residency in the UK i.e., indefinite leave to remain (ILR).[16] We will analyse three cases: first, the introduction of an annual salary threshold; second, the constant increase in application fees; and third, the introduction of an employment charge for non-EU workers known as the Immigration Skills Charge (ISC).[17]

In 2012, the government introduced a few meaningful changes to its immigration rules. The changes came into force on 6 April 2012. In the Statement of Changes, it was stated that these changes will affect those who entered with a Tier 2 visa (work permit) under the rules in force from 6 April 2011, and who will be eligible to apply for ILR from April 2016.[18] From 1 December 2020, the system was updated again, and Tier 2 visas were replaced by a general Skilled Worker Visa.[19] Under this new scheme, Tier 2 visa holders are considered to be Skilled Workers, and can still apply for ILR.[20] For the standard Skilled Worker visa, there is now a minimum annual salary threshold of £41,700 per year.[21]

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 living in the UK for 5 years, regardless of what their annual salary was. In April 2012, however, the rules changed and required applicants for settlement to have a Tier 2 visa for at least 5 years *and* to meet a minimum annual salary threshold of £35,000.[22] The practical implication was quite simple – and painful: those who entered the UK in 2011, under a reasonable assumption that eventually they would have ILR, had to leave the UK by 2016 if the main applicant did not earn more than £35,000 per

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16 For an overview, see GOV.UK, 'Indefinite leave to remain if you have a Skilled Worker, Health and Care Worker, T2 or Tier 2 visa' (*GOV.UK*) <https://www.gov.uk/indefinite-leave-to-remain-tier-2-t2-skilled-worker-visa> accessed 10 November 2025.

17 As of 1 January 2021, the ISC applies to EU migrants, see Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020; Home Office, *UK points-based immigration system: further details statement* (CP 258, 2020) para 21.

18 Home Office, *Statement of Changes In Immigration Rules* (HC 1888, 2012).

19 Home Office, *Statement of Changes In Immigration Rules* (HC 813, 2020) 219-40.

20 ibid 23, 231-33.

21 GOV.UK, 'Skilled Worker visa' (*GOV.UK*) <https://www.gov.uk/skilled-worker-visa/your-job#:~:text=Salary%20requirements,in%20the%20going%20rates%20table> accessed 10 November 2025.

22 Home Office HC 1888 (n 18) 62.

year (which was more than the median salary in the UK at the time of £28,028).[23] This is RRM in the weak sense as it changes the legal implications of an ongoing act or situation that started in the past and continues into the future. The ongoing act is living in the UK while holding a Tier 2 visa. Regarding those who entered the UK under a Tier 2 visa before April 2012, the new rules changed the legal implications of this ongoing act; they changed the legal rights of those who started committing the ongoing act before the rules came into force. The new rules, therefore, failed in guiding the behaviour of those who entered the UK before these rules were enacted.

A second example is the changes made to the ILR application fees for non-EU migrants. From 2014 onwards, the fees were frequently and significantly increased. For example, they increased from £1,093 in 2014 to £1,500 in 2015, then to £1,875 in 2016, and again to £2,297 in April 2017 and £2,389 in 2018.[24] The application fee then froze until 2022, largely due to the Covid-19 pandemic.[25] The fees as of April 2026 are £3,226 for main applicants and their

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23 Office for National Statistics, 'Annual Survey of Hours and Earnings' (*ONS*, 26 October 2016) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/annualsurveyofhoursandearnings/2016provisionalresults> accessed 8 November 2025.

24 Home Office, *Visa Regulations Correction* (Policy Paper, 2014) <https://webarchive.nationalarchives.gov.uk/ukgwa/20140322025923/https://www.gov.uk/government/publications/visa-regulations-revised-table> accessed 4 September 2025; Home Office, *Home Office Immigration & Nationality Charges 2015/16* (Policy Paper, 2015) <https://webarchive.nationalarchives.gov.uk/ukgwa/20150401003730/https://www.gov.uk/government/publications/visa-regulations-revised-table> accessed 4 September 2025; Home Office, *Home Office Immigration & Nationality Charges 2016* (Policy Paper, 2016) <https://webarchive.nationalarchives.gov.uk/ukgwa/20160510123533/https://www.gov.uk/government/publications/visa-regulations-revised-table#history> accessed 4 September; Home Office, *Home Office Immigration & Nationality Charges 6 April 2017* (Policy Paper, 2017) <https://webarchive.nationalarchives.gov.uk/ukgwa/20170409004008/https://www.gov.uk/government/publications/visa-regulations-revised-table> accessed 4 September 2025; Home Office, *Home Office Immigration & Nationality Charges 2018* (Policy Paper, 2018) <https://webarchive.nationalarchives.gov.uk/ukgwa/20180410205935/https://www.gov.uk/government/publications/visa-regulations-revised-table> accessed 12 November 2025.

25 Home Office, *Home Office Immigration and Nationality Fees: 29 March 2019* (Policy Paper, 2019) <https://webarchive.nationalarchives.gov.uk/ukgwa/20190412150110/https://www.gov.uk/government/publications/visa-regulations-revised-table> accessed 12 November 2025; Home Office, *Home Office Immigration and Nationality Fees: 6 April 2020* (Policy Paper, 2020) <https://webarchive.nationalarchives.gov.uk/ukgwa/20200501025845/https://www.gov.uk/government/publications/visa-regulations-revised-table/home-office-immigration-and-nationality-fees-6-april-2020> accessed 12 November 2025; Home Office, *Home Office Immigration and Nationality Fees: 6 April 2021* (Policy Paper, 2021) <https://webarchive.nationalarchives.gov.uk/ukgwa/20210430020941/https://www.gov.uk/government/publications/visa-regulations-revised-table/home-office-immigration-and-nationality-fees-6-april-2021> accessed 12 November 2025; Home Office, *Home Office Immigration and Nationality Fees: 6 April 2022* (Policy Paper, 2022) <https://webarchive.nationalarchives.gov.uk/ukgwa/20220428181213/https://www.gov.uk/government/publications/visa-regulations-revised-table> accessed 12 November 2025.

dependants (regardless of their age).[26] Around this timeline, the Immigration Health Surcharge (IHS) was also introduced – and kept increasing. The IHS is a fee that migrants in the UK are required to pay in order to have access to the NHS (National Health Services). Access to the NHS is free to all UK citizens. Migrants are required to pay the IHS even when they pay their national insurance contribution like all other UK citizens. The IHS was introduced in April 2015 at £200 per year. In December 2018 it increased to £400 per year. In October 2020 – to £624 per year, and as of 6 February 2024 it is £1,035 per year.[27]

These changes were always applied to those already living and working in the UK, which makes them RRM in the weak sense. A proper, fairer way of applying changes to application fees and the IHS, especially when the changes are meaningful, 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.

The final example focuses on the imposition of a charge for employing migrant workers. On 24 March 2016, the government confirmed that it was pressing ahead with plans to reduce Britain's reliance on migrant workers through a new skills charge.[28] The ISC was introduced in April 2017 and levies on employers that employ migrants in skilled areas. Set at £1,000 per employee per year, it is designed to cut down on the number of businesses taking on migrant workers and incentivise training British staff to fill those jobs.[29] Here we are not going to challenge the wisdom of this charge, its reasonableness, or its ability to achieve its purpose. We will only focus on its retrospective nature.

When the charge came into effect, employers were required to pay it whenever they issued a new Certificate of Sponsorship to a non-EU employee. Employers were not required to pay the charge if they had already issued such a Certificate prior to the introduction of the charge.[30] In

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26 Home Office, *Home Office Immigration and Nationality Fees: November 2025* (Policy Paper, 2025) <https://www.gov.uk/government/publications/visa-regulations-revised-table#work---applications-made-in-the-uk > accessed 4 September 2025.

27 Melanie Gower and CJ McKinney, 'The Immigration Health Surcharge' (CBP 7274, 2024) <https://researchbriefings.files.parliament.uk/documents/CBP-7274/CBP-7274.pdf> accessed 19 April 2026.

28 Department for Business, Innovation & Skills, 'Government's new Immigration Skills Charge to incentivise training of British workers' (*GOV.UK,* 24 March 2016) <https://www.gov.uk/government/news/governments-new-immigration-skills-charge-to-incentivise-training-of-british-workers> accessed 12 November 2025; The Immigration Skills Charge Regulations 2017.

29 The ISC increased by 32% on 16 December 2025, see Immigration Skills Charge (Amendment) Regulations 2025.

30 Home Office, 'Workers and Temporary Workers: guidance for sponsors part 2: sponsor a worker – general information' (*GOV.UK*, 11 November 2025) <https://www.gov.uk/government/publications/workers-and-temporary-workers-guidance-for-

some sense, this is prospective: there was no change to the legal consequences of an ongoing situation, i.e., a non-EU worker's employment that pre-existed the introduction of the charge. However, if that worker then changed their employment, the new employer would have to pay the fee. This essentially restricted the ability of non-EU workers to change their employment. Accordingly, the situation of non-EU workers who had a job before the fee came into effect – retrospectively changed – even though their employers did not have to pay the fee, as they could no longer change jobs as easily. In addition, if they wanted to leave that job for whatever reason, they were no longer able to do so without facing the indirect barrier of the ISC with a new employer. In cases where they *had* to leave their pre-ISC job for whatever reason, e.g., in cases where the employment relationship had broken down, they either had to find a new job with an employer who is willing to pay the charge or leave the UK.

If the new charges were applied regarding employing future migrants, those migrants who enter the UK from the introduction of the ISC onwards, it would have been truly prospective rulemaking. The new charges, however, are yet another example of RRM in a weak sense. It changes the legal consequences (ability to change employment) of an ongoing situation (migrants who live and work in the UK) that started in the past and continues into the present and the future.

In all three examples, the RRM in the weak sense does give its subjects a choice: earn £35,000 a year – or leave the UK; pay the new, outrageously excessive application fee for permanent residency – or leave the UK. If you need to leave your current job for whatever reason, find an employer who is willing to pay £1,000 a year as a fine for employing non-British workers – or leave. This is, of course, not a real choice. People have a real choice when they have an adequate number of valuable options to choose from. In these examples, the UK government, by applying RRM, either denies migrants any choice (one cannot 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, regarding the application fee increase, forces migrants to "choose" between leaving the UK or paying significantly more than they were planning to pay when arriving – in order to stay in the UK permanently.

A decision to leave one's country, home, and previous life, and emigrate to another country with an intention to stay there permanently, normally entails significant costs, and at times,

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sponsors-part-2-sponsor-a-worker/workers-and-temporary-workers-guidance-for-sponsors-part-2-sponsor-a-worker-general-information-accessible#Immigration_skills_charge> accessed 27 November 2025.

irreversible and life-changing sacrifices. In the examples above, the RRM in a weak sense – precisely because it is retrospective – completely fails in guiding people's behaviour, diminishes their autonomy by denting a real choice, disregards people's reasonable expectations and prevents 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 ongoing act or situation, this RRM is in fact potentially immoral. This RRM is also immoral because it takes advantage of the diminished autonomy that it created in order to achieve a particular end at the expense of its subjects, i.e., it capitalises on the diminished autonomy that it created to encourage migrants to leave the UK, discourage future migrants from moving to the UK, or force migrants who decide to stay to pay significantly more for the right to stay.

To further evaluate the morality of this RRM in the weak sense, 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, about the future changes to the rules. If the answer is yes – we have strong reliance on the previous rules. We assert that in such a case, the RRM in the weak sense can be justified only in exceptional cases where compelling reasons outweigh the legitimate interests of those who are affected by the RRM. If the answer is no – then there is no reliance, which may lead some to conclude that the presumption of immorality is much weaker here. That, we think, will be misguided. Lack of reliance is probably more relevant to the case of the rapid and significant increase of ILR application fees. Since 2014, and on average, a migrant who came to the UK while the application fee was X, found that they had to pay X + £1,000 when they apply for ILR, 5 years later (and more than that when we take into account the increases of the IHS). For a family of four, it will face an unexpected expense of more than £6,000 (if we take into account the increases of the IHS). Even when there is no reliance, the retrospective application of the increases of both application fees and IHS clearly takes advantage of the vulnerable position of many migrants, who, after already making the life-changing and costly decision to leave their home countries and come to the UK, will not easily leave the UK even in the face of policies that exploits them financially. The immorality of the RRM in the weak sense in this case, still, therefore, very much exists, even with lack of reliance.

The presumption of immorality is indeed stronger in cases where migrants would have decided not to migrate to the UK if they knew, before migrating, about the future changes to the rules. This presumption can be refuted. Given the presumption of immorality, those who introduced

the above rules and decided to apply them retrospectively (in the weak sense) carry the burden of refuting said presumption. This can be done by applying the proportionality test, a well-established constitutional balancing test, that can be used also for evaluating the morality of general legal norms.[31] We will refer to the proportionality test in its most 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*).[32]

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 that the reasoning for the change was to help cut the number of non-Europeans and their dependants granted permanent residency each year from 60,000 to 20,000.[33] 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. Regarding 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. For our purposes, we assume that there are no such measures, even though there may be. 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, without elaborating on this point, that the RRM in this case is disproportionate. The retrospective change prevented those who already moved to the UK from making an informed decision as to whether to immigrate to the UK. The change frustrates legitimate expectations

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31 Since the Human Rights Act 1998 came into force in the UK and required UK courts to apply the proportionality test regarding protected rights, there has been an ongoing and fierce academic dispute about whether the proportionality test should (or even can) be a general ground of judicial review in public law. Here, we use the proportionality test to decide the morality of the RRM in the weak sense, rather than its legality.

32 This four-stage test was adopted and applied in *Bank Mellat v HM Treasury* [2013] UKSC 39 [20] (Lord Sumption), [68]-[76] (Lord Reed in his dissenting opinion). For recent, excellent and in-depth discussions of proportionality in public law see: Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012); Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (CUP 2013); Timothy Endicott, 'Proportionality and Incommensurability' in Grant Huscroft, Bradley W. Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 311.

33 Home Office, *Changes to Tier 2 Settlement Rules Impact Assessment* (Impact Assessment, 2012) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645852/impact-assessment-tier2.pdf> accessed 13 November 2025; BBC, 'Immigrants 'have to earn £35,000' to settle – from 2016' (*BBC*, 29 February 2012) <https://www.bbc.com/news/uk-politics-17204297#:~:text=The%20government%20has%20pledged%20to,made%20it%20their%20permanent%20home.> accessed 12 November 2025.

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 probably not have made this life-changing decision had they known that this new restriction would be introduced in the future. These people cannot 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 of people, and the gross violation of the rule of law in this case cannot possibly be justified by the wish to cut the number of non-Europeans granted residency each year, especially when this aim could have been achieved, albeit in part and over a longer period of time, if the change to the rule applied in a prospective way.

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 cannot 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 retrospectively. The practice of RRM in the weak sense, as exemplified in the cases above, 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 moving 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 £41,700 a year. However, being aware of the British habit of significantly changing immigration rules frequently and retrospectively, they cannot 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.[34]

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[34] 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 sensitive 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 its retrospective application, we will not elaborate on this point here.

The proportionality test can also be applied to assess the justifications for the changes of the ILR application fee. These fees repeatedly increased throughout the 2010s to date.[35] The obvious purpose of these changes was to deter immigrants from applying for ILR, thus encouraging them to leave the UK after a stay of 5 years. Other aims that were publicly expressed were relieving the pressure put upon the immigration department and reducing the taxpayer burden for elements of the immigration system which are not funded by fees.[36]

Applying the proportionality test to this case, we assume that the aim to reduce the number of applications for residency 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 aim. 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 potentially immense 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 to apply for ILR five years later. By then, the fees were increased to £9,556. This increase applies to the family retrospectively (in the weak sense). This RRM is disproportionate for the reasons mentioned above. It is immoral, because its consequences are meaningful and because discontinuing the immigrants' ongoing situation (living in the UK) requires significant sacrifices. While the harm caused to migrants is clear, the question of reliance is more complicated. As we argued above, the right way to ask the question of reliance here is to ask whether 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, expecting to pay £4,372 as application fees, would have still immigrated to the UK had they known that eventually they will have to pay £9,556 instead. The answer to this question is case-sensitive, perhaps speculative. It is likely that some migrants did have reliance whereas others did not, yet it is safe to assume that for most migrants, the increase in the application fees, however significant and presumably unjustified, was probably not enough to have undermined their ability to make long term plans.

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35 Home Office (n 24, n 25, n 26).

36 For example, see Explanatory Memorandum to The Immigration and Nationality (Fees) Regulations 2014, paras 7.1-7.2. For a more recent example, see Explanatory Memorandum to The Immigration and Nationality (Fees) Regulations 2025, para 5.2; Amelia Hill, 'Home Office makes thousands in profit on some visa applications' (*The Guardian*, 1 September 2017) <https://www.theguardian.com/uk-news/2017/sep/01/home-office-makes-800-profit-on-some-visa-applications?> accessed 16 November 2025.

Yet, and as mentioned above, lack of reliance does not always morally legitimise exploiting people's vulnerability to RRM.

The reasoning presented above – and its conclusions – apply in a very similar way to the ISC. This was not applied to migrants whose employment pre-dated the levy; it only applied to new employment.[37] The aim of the rule is to incentivise employers to invest in British staff – and to use the ISC to address skills shortages in the UK.[38] 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 because of the harm caused to non-EU workers by the restriction on their ability to change their employment. That said, the introduction of this requirement, and the corresponding restriction on a non-EU worker's ability to switch jobs, is in most cases unlikely to have changed a non-EU worker's decision to move to the UK in the first place. Accordingly, for the same reasons why the increase to the application fees is immoral, this RRM is also at least morally suspicious.

While applying the arguments above about the morality of RRM in the weak sense regarding UK immigration policy, we assumed that immigrants who live in the UK, as well as potential immigrants, have legitimate expectations that immigration policy will not change, at least not significantly, in a retrospective way. It can be argued, however, that non-citizens who live in the UK, and even more so – potential immigrants, do not really have legitimate expectations that rules that apply to them will not apply retrospectively.[39] We think this argument is misguided, yet will only offer a brief explanation as to why that is the case.

As to potential immigrants, the argument that the practice of RRM in the weak sense, as exemplified in the cases above, prevents those who are considering moving to the UK from making informed decisions about their long-term life plans, does not imply that future immigrants have legitimate expectations that immigration laws will not change – *before* they move to the UK or perhaps before they start acting on their intention to move to the UK. They do have legitimate expectations, however, that after migrating to the UK, immigration laws that apply to them will not change retrospectively, also in the weak sense, for all the reasons mentioned above – and the ones we will mention below. The point we made here about potential immigrants that are only considering moving to the UK is less about morality and more about policy: if the UK is interested in allowing immigration at all, under whatever

37 Home Office (n 30).
38 Department for Business, Innovation & Skills (n 28).
39 And we thank one of the reviewers for raising this point.

conditions, then it must be aware that continue applying immigration rules retrospectively may deter almost all potential immigrants from immigrating to the UK, because the constant violations of the rule of law regarding immigration rules prevent all potential immigrants from making informed decisions about their long-term life plans.

As to immigrants who already live in the UK, and within the context of this paper, i.e. within the context of evaluating the morality of RRM (mostly in the weak sense) in light of Raz's perception of the rule of law, we do not think the distinction between citizens and others who live in the UK legally, has any moral implications. Within this context only, our arguments apply in the same way regarding all those who live in the UK and are subject to the law in the UK. The rule of law, as a political or moral doctrine, should be followed regarding all those who are subject to the law, with their status as citizens, permanent residents, or temporary ones being an irrelevant consideration. To be clear: non-citizens in the UK (and generally) may have no moral right for a certain immigration policy. However, when immigrants enter the UK under a certain immigration policy, said policy does grant them legal rights (regarding the conditions they need to meet in order to be granted citizenship – or extended stay in the UK). Once these legal rights are granted, and for all the reasons mentioned above, those who hold these rights do have a moral right and legitimate expectations that these rights will not be retrospectively denied, including in cases of RRM in the weak sense.

RRM in the Weak Sense - and Non-EU Immigration to the UK: Legal Aspects

Thus far, we focused on the morality of the retrospective application of a few immigration rules in the UK. We avoided evaluating the legality of said retrospective application, as that would require a separate discussion. In the following, we will offer initial thoughts about this separate topic and an initial guideline that will hopefully inform further discussion on the topic.

In the UK, immigration rules are decided by the Home Secretary, and they come into force without the need of Parliamentary approval. A slight legal complication can be found in the "governing norm" of all immigration rules. This norm, that was created by government, rather than Parliament, 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'.[40] Put differently, the government saves the right to apply its immigration rules retrospectively (in the weak

[40] Home Office, *Statement of Intent: Changes to Tier 1, Tier 2 and Tier 5 of the Points Based System; Overseas Domestic Workers; and Visitors* (Statement of Intent, 2012) 18 <https://assets.publishing.service.gov.uk/media/5a823d1840f0b62305b93385/tiers125-pbs-overseas-soi.pdf> 16 November 2025.

sense) i.e., to apply them regarding people who already immigrated to the UK and work there legally. This is a case where the executive branch openly states that the immigration rules are not subject to the rule of law insofar as they permit RRM in the weak sense. We suggest, albeit briefly, that the government has no such power.

Two arguments can be made here against the power of government to apply immigration rules retrospectively (in the weak sense): a jurisprudential-philosophical argument and a legal one. As to the jurisprudential-philosophical argument, and in short: even if the rule of law is not entrenched in a written, legally supreme Constitution (as is the case in the UK), generally, government is still bound by the law, i.e., by primary legislation, and in the UK – Acts of Parliament. Its powers are created and allocated by Parliament, i.e., by "the law". The purpose of the law as law is to guide people's behaviour. For the law to achieve its purpose – it must be prospective (subject to exceptional circumstances). Government, which is created by the law and is subject to the law, cannot assume the authority to frustrate the very purpose of the law. It cannot undermine they very "thing" that creates it and gives it its powers. It therefore cannot assume the authority to violate the rule of law, unless explicitly authorised to do so by Parliament. It cannot 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 above "governing norm" is problematic from a "philosophy of law" perspective. That is not to say that it cannot be justified. Violations of the rule of law can be justified. Our point here is that RRM, also in the weak sense, requires justification, either by applying the proportionality test or by other means, yet it seems that there has never been an attempt to justify the RRM here, presumably also because it was never perceived as such.

The governing norm of immigration rules in the UK is also problematic and presumably ultra-vires, from a more legal-doctrinal perspective. Section 1(a) of The Constitutional Reform Act 2005 entrenches 'the constitutional principle of the rule of law'. If the UK does have an unwritten constitution, the rule of law was always part of it. Since 2005, however, the rule of law is a "statutory constitutional principle". If parliamentary sovereignty and the rule of law are two of the cornerstones of the UK constitution, and if after 2005 the rule of law became a statutory constitutional principle, then it must mean that government has no legal power to create general legal norms that contradict the rule of law, unless specifically authorised to do so by Parliament – or if it is found that the RRM, including in the weak sense, is proportionate.[41]

[41] We appreciated that in the UK, proportionality is not a general ground of judicial review, i.e., that it is limited to cases where protected human rights are infringed. Yet here we subscribe to the view that

Thus, and in our case, if the rule of law prohibits RRM, and if RRM also includes RRM in the weak sense – for all the reasons described above, then government has no legal power to authorise itself to apply general legal norms retrospectively. This means that the "governing norm" of all immigration rules, according to which 'the Immigration Rules are subject to change and applicants must see the requirements in place at the time they make their application to settle'[42] – has no legal effect. The retrospective application of immigration rules (also in the weak sense) can only be legally valid if Parliament specifically authorised government to do so – and it did not, or if the retrospective application is proportionate – and it is not, as argued above.

To make things worse, the Home Office is now in the process of implementing the changes proposed in its 2025 paper on 'earned settlement'.[43] With regard to non-EU immigrants obtaining ILR, the proposed changes will likely give rise to RRM in the weak sense. This is because the standard qualifying period for ILR would increase from 5 to 10 years for many migrants (though different qualifying periods for ILR will apply depending on the circumstances of the individual e.g., those earning over £125,140 may qualify for a reduction of 7 years, and those in higher-skilled jobs, either earning over £50,270 or working in the public sector, healthcare, or teaching roles may qualify for a reduction of 5 years).[44] Thus, some Skilled Workers will need to be living continuously in the UK for 10 years to qualify (and for jobs that are considered low or medium-skilled, this may be up to 15 years).[45] The consultation proposes to apply this change retrospectively to anyone who entered after 2021, i.e., applicants who are due to reach settlement will be subject to these new requirements as soon as the rules have changed.[46] For all the reasons mentioned above, the retrospective application of these new rules will be immoral and possibly illegal. However, while some of the changes proposed in the paper have already been implemented (e.g., for certain visas, applicants seeking ILR must

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proportionality in fact does not add anything new to already existing grounds of judicial review, thus it can be applied to non-human-rights cases as well. For this view, see: Y Nehushtan 'The Non-Identical Twins in UK Public Law: Reasonableness and Proportionality' 50(1) *Israel Law Review* (2007) 69-86. If one disagrees with this view, then they may read "reasonableness" whenever we say "proportionality". Our legal analysis will still be the same.

42 Home Office (n 40).

43 Home Office, *A Fairer Pathway to Settlement* (CP 1448, 2025).

44 Melanie Gower and CJ McKinney, 'Changes to UK visa and settlement rules after the 2025 immigration white paper' (CBP 10276, 2025) para 3.2 <https://commonslibrary.parliament.uk/research-briefings/cbp-10267/> accessed 19 April 2026.

45 ibid.

46 ibid para 3.5; Home Office, 'Biggest overhaul of legal migration model in 50 years announced' (*GOV.UK*, 20 November 2025) <https://www.gov.uk/government/news/biggest-overhaul-of-legal-migration-model-in-50-years-announced> accessed 26 November 2025.

now meet a B2 English requirement; this will only apply to applications from March 2027), the government is still analysing responses on the proposed changes to the requirements and qualifying period for ILR.[47] We will therefore avoid exploring this unfortunate development in further detail.

Conclusion

This paper defined RRM in the weak sense, differentiating it from the more commonly understood and thoroughly examined RRM in the strong sense. We have evaluated the morality, and briefly – the legality of several cases of RRM in the weak sense in the UK regarding the rules governing non-EU immigration. To do so, we developed and applied criteria for assessing the morality of these cases.

Regarding the British practice of frequently amending its immigration rules retrospectively: many of these changes made migrants 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 subjects", denying their autonomy or giving them a "choice" between bad options and even worse ones. Many of these changes are ultimately in gross violation of the rule of law. The legality of this RRM is doubtful. Its immoral nature is indisputable.

Whilst states should be relatively free to decide their immigration policy, and while we refrained from evaluating the wisdom or reasonableness of British immigration policy and the rules discussed above, we do argue that states should normally refrain from applying their laws retrospectively – even when the RRM is in the weak sense. When these laws are being applied retrospectively, the lawmaker should carry the burden of justifying it. It seems that all UK governments from the 2010's were unaware that they were introducing retrospective legal norms regarding non-EU immigration, thus never made an attempt to justify the retrospective application of these norms.

A just state should aspire to apply moral public policies rather than immoral public policies that are barely legal. Particularly regarding its immigration policy, and within the context of RRM, the UK has very few reasons to be proud of its moral stance.

47 Gower and McKinney 2025 (n 44).