The Uncertain Scope of Article 15(1) of the International Covenant on Civil and Political Rights

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Les deux litiges canadiens (Van Duzen *et* MacIsaac) *soumis au Comité des droits de l'Homme démontrent combien la portée particulière de l'article 15(1) du* Pacte international relatif aux droits civils et politiques *demeure imprécise. Les travaux préparatoires, l'historique des dispositions ratifiées ou signées par les Etats aussi bien que les déclarations du Comité y ont jeté peu d'éclairage. Les tribunaux doivent donc s'efforcer de circonscrire les notions de "peine", "délit" et "peine plus légère", de déterminer si les moments "postérieurs" décisifs doivent être établis à partir du jour de la commission de l'infraction, de la condamnation ou de l'imposition de la sentence, et même de préciser si l'article pourrait être interprété comme l'octroi d'un droit illimité à bénéficier du droit postérieur.*

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1 INTRODUCTION

On 23 March 1976 the *International Covenant on Civil and Political Rights* entered into force for 35 states. By the end of 1982 it had entered into force for 37 more states, including Canada (19 August 1976) and the United Kingdom (20 August 1976), so that at present 72 states are bound by the provisions of the Covenant.

Pursuant to article 28 of the Covenant, a Human Rights Committee (HRC) of eighteen members was established on 20 September 1976 and given the competence to study the reports submitted by the states parties on the measures they have adopted giving effect to the rights recognized in the Covenant and on the progress made in the enjoyment of those rights (art. 40 of the Covenant).

Under the Optional Protocol to this Covenant, the Human Rights Committee also has the competence " . . . to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant".[1] By the end of the year 1982 twenty-eight states had recognized this special competence of the Committee.

This article has been motivated by certain problems of interpretation of the Covenant which became apparent in two cases submitted to the Committee by individuals in Canada. The cases involved an examination of the scope of the last sentence of paragraph 1 of article 15 of the Covenant. Article 15(1) provides:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. *If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.* [Authors' italics]

Views under article 5(4) of the Optional Protocol on the case of Gordon Van Duzen[2] were adopted by the Human Rights Committee during its fifteenth session in April 1982; views on the case of Alexander MacIsaac[3] were adopted in the seventeenth session in October 1982. Both decisions have been published by the Committee.

2 THE CASES AND THE PROBLEMS RAISED

(a) Factual Background

The relevant facts of the cases are as follows: Gordon Van Duzen had been sentenced on 17 November 1967 and 12 June 1968 upon conviction for

1. Optional Protocol, art. 1.
2. CCPR/C/DR (XV)/R.12/50, reissued in the Report of the Human Rights Committee to the General Assembly, Supplement No. 40 (A/37/40), pp. 150-156. [This case is also reproduced in this issue at p. xx.]
3. CCPR/C/D/(XVII)/R. 13/55.

different offences to three-year and ten-year prison terms, to be served concurrently and to expire on 11 June 1978. On 31 May 1971 Van Duzen was released on parole under the *Parole Act* of 1970, then in force. During parole he committed the crime of breaking and entering; on 13 December 1974 he was convicted and subsequently sentenced to a term of three years. By operation of section 17 of the *Parole Act* of 1970 his parole was treated as forfeited, so that the combined terms to be served were calculated to expire on 4 January 1985. On 1 May 1981 Mr. Van Duzen was again released under mandatory supervision, which is substantially equivalent to parole.

Alexander MacIsaac was sentenced on 26 November 1968 to a term of eight years' imprisonment on counts of armed robbery. He was released on parole on 21 March 1972 and on 27 June 1975 was convicted of an offence of breaking, entering and theft, arising from an occurrence on 27 July 1973, when he was on parole. Pursuant to the *Parole Act* of 1970, the time which MacIsaac had spent on parole from 21 March 1972 to 27 June 1975 was automatically forfeited and he was required to re-serve that time, plus the remainder of the original sentence, plus a consecutive term of 14 months upon sentencing for the second offence. On 7 March 1979 Mr. MacIsaac was again released in order to serve the remaining part of his sentence under mandatory supervision.

(b) Allegations

In both cases the alleged victims sought a finding by the Committee that the last sentence of article 15(1) of the Covenant had been violated with respect to them.

The alleged victims argued that the *Criminal Law Amendment Act*[4] enacted by the Parliament of Canada on 15 October 1977 provided, in section 31, for a "lighter penalty" from which they should have benefited. This section amended section 20 of the Parole Act, subsection (2) of which reads:

> Subject to subsection (3), when any parole is revoked, the paroled inmate shall, notwithstanding that he was sentenced or granted parole prior to the coming into force of this subsection, serve the portion of his term of imprisonment that remained unexpired at the time he was granted parole, including any statutory and earned remission, less
> (a) any time spent on parole after the coming into force of this subsection.

This Act repealed provisions of the *Parole Act* of 1970 including the principle of automatic forfeiture of parole upon conviction for an offence committed by the parolee while on parole, introducing instead revocation of parole at the discretion of the court. In this connection, *i.e.* upon revocation of parole, time spent on parole *after* 15 October 1977, the date of entry into force of the Act, was not to be re-served in prison. However, Mr. Van Duzen and Mr. MacIsaac claimed that such reform should also have been applied

4. *Criminal Law Amendment Act 1977*, S.C. 1976-77, c. C-53, amending the *Parole Act*, R.S.C. 1970, c. P-2.

retroactively to them. In other words, under the new principle they should not have been required to re-serve the forfeited portion of their parole time, which in their cases had been forfeited *prior* to 15 October 1977, the date of coming into force of the new Act. Since the law did not provide for such retroactive effect, they submitted that the Government of Canada was required to enact legislation giving retroactive effect to section 20(2)(a) of the *Parole Act*, as amended, in order to satisfy the commitment enunciated in article 15(1) of the Covenant.[5]

Since thus far there is no law invalidating the automatic forfeiture of parole in cases prior to 15 October 1977, both Mr. Van Duzen and Mr. MacIsaac submitted petitions for the royal prerogative of mercy as the only and last remedy to exhaust. In both cases, after examination by the Governor General of Canada on the advice of the Privy Council for Canada, the petitions were rejected for a number of reasons, inter alia because in the view of the Canadian government the forfeiture of parole does not constitute a "penalty" within the meaning of article 15 of the Covenant.

It appears that this matter is one of general interest, since at least hundreds of inmates in Canadian prisons are or have been in a similar situation to Van Duzen and MacIsaac.

(c) Admissibility and Problems of Interpretation

Before considering any claims contained in a communication, the Human Rights Committee (HRC) must decide whether the communication is admissible under the Optional Protocol. This duty follows from the terms of the Protocol itself, and is confirmed by rule 87 of the Provisional Rules of Procedure of the Committee.

Canada raised in both cases one general objection against admitting them for examination on the merits: the rules on parole were said not to concern "penalty" within the meaning of article 15(1), and the communications were therefore argued to be "incompatible" with the provisions of the Covenant and as such inadmissible under article 3 of the Optional Protocol. The Committee rejected this objection and declared the cases admissible, thus implying that if the question whether parole concerned "penalty" were relevant, the answer would depend on an examination of the merits of the contending interpretations.

A further comment on the problems raised by these cases should be made at this point. Among the first criteria of admissibility to be examined by the HRC is whether the communication relates to events prior to the date of entry into force of the Covenant for the state concerned. However, Canada did not

5. In this respect they referred to art. 2(2) of the Covenant which provides: "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

raise the issue of inadmissibility *ratione temporis* in either the *Van Duzen* or in the *MacIsaac* case, a matter which apparently was not examined in depth at that stage. Here it should be recalled that the text of article 15(1) seems to lay down its own applicability in time. What we have in mind is that it could be read to the effect that the crucial points in time are the dates of the commission of the offence and of the imposition of penalty. In these two cases the dates of commission of the offences, of conviction and of sentencing were all prior to the entry into force of the Covenant for Canada (19 August 1976). Yet, this fact is not conclusive. The "subsequent . . . provision . . . made by law" which was in dispute occurred on 15 October 1977, which was subsequent to the entry into force of the Covenant for Canada, and this enactment was therefore subject to article 15(1).

We shall assume — although it is not a matter of course — that the right to benefit from such a new law under this provision must apply to all "imposition" of penalties after the Covenant entered into force, even if the relevant (last) offence itself was committed earlier, as in the *Van Duzen* and *MacIsaac* cases. But the alleged right to benefit from the new provision then would seem to depend on the meaning of the term "imposition". In other words, the difficult question arises as to when, more precisely, the imposition of a penalty within the meaning of article 15(1) is deemed to take place. If "imposition" refers only to the sentencing, it could be argued that article 15(1) would not apply to these cases, because all relevant events took place before entry into force of the Covenant for Canada and thus the cases should have been declared inadmissible *ratione temporis*. On the other hand, "imposition" could also be interpreted as referring to the serving of the sentence, since punishment could be seen as being continuously "imposed" as long as the sentence is not fully served. If so, article 15(1) would not be inapplicable *ratione temporis* to these cases, because both Van Duzen and MacIsaac were still serving their sentences when the new Act was passed. There exists also a third possible reading, disconnecting the right altogether from the date of "imposition" of the penalty, and interpreting the provision as granting an unlimited right to benefit from the subsequent law, and to have the case reviewed even after the serving of the sentence (*e.g.* by providing compensation).

In the circumstances, when declaring the two cases admissible without any comment in these respects, the Committee cannot be said to have done more than to leave these points of interpretation open. Since the alleged violation consisted in the fact of not making retroactive a particular Act passed at a date when the Covenant was already in force, it may have seemed sufficient at that stage to note the date of the Canadian Criminal Law Amendment Act 1977 and to consider the effect of that alleged failure on the position of Mr. Van Duzen and Mr. MacIsaac, as the Committee next proceeded to do.

3 THE VIEWS OF THE HUMAN RIGHTS COMMITTEE

However, when the Committee later came to examine the merits of the *Van Duzen* and *MacIsaac* cases, its views adopted under article 5(4) of the

Optional Protocol did not contain any examination in depth of the difficult issue of interpretation as to when the "imposition" of a penalty is deemed to take place, or other complex issues, involving in particular the meaning of the terms "offender", "penalty" and "lighter penalty" in article 15(1). Indeed, as has been the practice of the Committee since its inception, it exercised restraint and pronounced its views in an economical fashion. This attitude results not only from the pragmatism of the Committee, but also from a basic principle of the Optional Protocol. The Committee has noted in many of its recent views as it did in the *MacIsaac* case that "it is not its task to decide in the abstract whether or not a provision of national law is compatible with the Covenant".[6] Thus it focused its analysis on the question whether the facts supported a finding that the alleged victims had clearly established that their position in the end was substantially affected by the applicability or non-applicability of the new provision, *i.e.* that they were in fact "victims" within the meaning of articles 1 and 2 of the Optional Protocol.[7] By this approach to the merits of a communication, legal issues of principle will only be decided to the extent needed to apply the Covenant to the facts as interpreted by the Committee.

Thus, in the *Van Duzen* case the Committee expressed the view that since he was released on 1 May 1981 on mandatory supervision instead of serving the full term until 5 January 1985, he "in fact obtained the benefit he has claimed". According to his own claim he should have been free only on 9 June 1981. Although he had mentioned that the terms of supervision made his position different from that of a free man, the HRC observed that this position now depended on his own behaviour. The risk of re-imprisonment could not represent any actual violation of the right invoked by him. This might be read as a suggestion that any complaint about his position after release would have to be regarded as a new communication.

These laconic views of the Committee in the *Van Duzen* case may have come as a surprise to the parties whose elaborate submissions inter alia on various aspects of Canadian law went without much comment. In the *MacIsaac* case some months later, the Committee entered a little more into detail when setting out its reasoning on the facts. It noted the lack of more precise submissions from the author on the stage of the merits, and the difficulty in determining whether his position had in fact been adversely affected by the situation of which he complained. The Committee went on to note that the Canadian *Criminal Law Amendment Act* of 1977 had made the system for dealing with recidivists more flexible by providing for, instead of automatic forfeiture of parole, a system of revocation at the discretion of the National

6. *Supra*, note 3, at p. 5.
7. For a discussion of this concept and the related principle that the Protocol does not grant an *actio popularis*, see Möse and Opsahl, "The Optional Protocol to the International Covenant on Civil and Political Rights" (1981), 21 Santa Clara Law Review 271 at 299-302.

Parole Board and sentencing for the recidivist offence at the discretion of the judge. Whereas the author claimed that he would have been released earlier on the hypothesis that the new provisions had been applied to him retroactively, the Committee was of the view that this hypothesis had not been conclusively established. The Committee noted that under the old system the judge exercised his discretion in deciding the length of a penalty to be imposed. In the case of Mr. MacIsaac, the recidivist offence carried a possible sentence of up to 14 years. The Committee referred in particular to the fact that the judge, while noting that MacIsaac's criminal record was "serious" and explicitly mentioning that Mr. MacIsaac's parole had been forfeited, sentenced him to 14 months. The Committee said it was "not in a position to know, nor is it called upon to speculate, how the fact that his earlier parole was forfeited may have influenced the penalty meted out for the offence committed while on parole". The burden of proving that he had been denied an advantage under the new law and that he was therefore a "victim" lay with the author. In this context the Committee had already noted that one could not focus as Mr. MacIsaac apparently did, "only on the favourable aspects of a hypothetical situation and fail to take into account that the imposition of the 14-month sentence for a recidivist offence was explicitly linked to the forfeiture of parole". There is in Canadian law no single fixed penalty but a scale of penalties for such a recidivist offence and full judicial discretion to set the term of imprisonment up to 14 years. Mr. MacIsaac failed to establish the hypothesis that if parole had not been forfeited the judge would have imposed the same sentence of 14 months and that he would have been actually released prior to May of 1979.

Thus the Committee in both cases expressed the view that the facts submitted did not disclose any violation of article 15(1) of the Covenant.

4 THE QUESTIONS NOT ANSWERED BY THE COMMITTEE

The precise scope of article 15(1) remains to be clarified. Doubts persist as regards both its applicability in time and stage of process, and the meaning of some of its terms, such as "offender", "penalty" and "lighter penalty".

Before going into these difficult questions it should be recalled that the principle of extending retroactively the benefit of a provision for a lighter penalty, as expressed in the last sentence of article 15(1) of the Covenant, has not gained universal acceptance, or at least needs to be circumscribed. For instance, the present authors may recall the position in their own countries. In the United States, the repeal or amendment of the statute under which an accused was convicted does not affect the legitimacy of conviction or the propriety of punishment.[8] Similarly, a downward modification of potential

8. J.G. Cook, *Constitutional Rights of the Accused; Post-Trial Rights* (Rochester, The Lawyers Cooperative Publishing Co. 1976) p. 11; *United States v. Rojas-Colombo*, 462 F. 2d 1091 (Fla. CA5 1972); cert. den. 410 U.S. 990, 36 L.Ed. 2d 188, 93 S. Ct. 1507; *Capuchino v. Estelle*, 506 F. 2d 449 (Tex. CA5 1975), reh. den. 509 F. 2d 576; cert. den. 46 L. Ed. 2d 62, 96 S. Ct. 75.

punishment subsequent to the sentencing of the accused need not inure to his benefit.[9] And even where a criminal statute has been held unconstitutional, a penalty already suffered, *e.g.* a fine already paid, need not be restituted.[10] In Norway, no law may be given retroactive effect[11] but as an exception new penal provisions in force at the date of the decision shall apply if they lead to a result which is more favourable to the accused than the law at the date of the commission of the crime.[12] This principle, however, does not extend to changes in the law pending appeal or requests for re-trial, and even less after the penalty has been suffered.[13]

Another example of national legislative concern with the matter can be taken from the United Kingdom: Section 38 of the *Interpretation Act* of 1889,[14] still in force, provides that

> Where this Act, or any Act passed after the commencement of this Act, repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . . (d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or (e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid; and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.

Similar provisions exist in Canada.[15] Moreover, repealing Acts in the United Kingdom may contain clauses for the purpose of keeping alive the statutes they repealed so far as they relate to offences committed against them, and in repeals effected after 1889 there is a presumption to this effect.[16]

(a) Applicability in Time and Stage of Process: No Cut-off Date?

Since the text of article 15(1) does not offer sufficient guidance to decide the various issues outlined above, attention must be directed first to its context and purpose, in accordance with accepted principles of interpretation of treaties, and possibly also to the *travaux préparatoires*, where some interesting material can be found. As to its immediate context and purpose, the provision under consideration is an exception from the main principle of article 15(1),

9. *McDougle v. Maxwell*, 1 Ohio St. 2d 68, 203 N.E. 2d 334 (1964); *Pollard v. State*, 521 P. 2d 400 (Okla. 1974).
10. "Recent Developments: Criminal Procedure — Guilty Pleas — Seeking Relief When Statute Held Unconstitutional Retroactively" (1976), 43 Tennessee Law Review 464.
11. Norway, *Constitution of 1814*, art. 97.
12. Norway, *Penal Code of 1902*, art. 3.
13. The two standard Norwegian treatises on criminal law, J. Andenaes, *Alminnelig strafferett* (2nd ed., Oslo 1974) pp. 509-521 and A. Bratholm, *Strafferett og samfunn* (Oslo 1980) pp. 361-370, discuss the many detailed issues and judicial decisions concerning the "more favourable" clause. It does not apply, *e.g.* to procedural changes, or to the way in which a sentence is executed, including matters of release on probation.
14. *Interpretation Act 1889*, S.U.K. 52 & 53 Vict., c. 63.
15. *Interpretation Act*, R.S.C. 1970, c. I-23, s. 35.
16. J.C.W. Turner, ed., *Russell on Crime* (12th ed., London, Stevens & Sons 1964) p. 69.

which is that the criminal law should be applied as it stood when the offence was committed, *nulla poena sine lege*. The purpose of the main principle is to proscribe, and thus protect individuals against, ex post facto criminal laws operating to their detriment. The exception reasonably departs from this safeguard when its purpose is absent; on the contrary, it not only allows, but prescribes the retroactive operation of the new law when it is to the individual's benefit. However, this is not to apply in all respects. It relates to and is limited by the concept of "penalty", in particular "lighter penalty", to which we will come later. And the individual entitled to benefit is described as "the offender". Whether this term implies a limitation, is also a question worth considering (below).

As a point of departure it is noteworthy that the text of article 15(1) does not indicate any other limitation on the offender's right to benefit from a lighter penalty provided for after the offence. However, in our view there must in any event be some implied limitations, either in time or with regard to the stage of process to which it is applicable. If not, the results would hardly be practicable or foreseeable; the provision would seem to require a reconsideration, administrative or judicial, of sentences already passed and perhaps even already served, not permitting any time limit or cut-off date to be fixed by national law. This can hardly be the purpose of the provision, and would hamper rather than promote criminal law reform.

The draft Covenant on civil and political rights was under discussion in the United Nations General Assembly since its ninth session in 1954. The Third Committee at its 1007th to 1013th meetings in October and November 1960, during the fifteenth session of the General Assembly, debated the text of article 15 of the Covenant[17] and finally adopted it as it had been submitted by the Commission on Human Rights[18] after rejecting all amendments. However, the last sentence of the first paragraph as set out above, was the subject of considerable discussion, exactly on points of concern to us here.

While the representative of Norway proposed in an amendment to delete the last sentence of paragraph 1 completely, the representative of the United Kingdom proposed to replace it by the following:

> If the maximum penalty under the law in force at the time when the sentence is passed is less than was provided by the law in force at the time when the offence was committed, the offender shall benefit thereby.

The United Kingdom's amendment was later revised to read:

> If the law in force at the time when the sentence is passed is more favourable to the

17. Official Records of the General Assembly, Fifteenth Session, Agenda item 34, A/4625, 8 Dec. 1960.
18. Official Records of the Economic and Social Council, Eighteenth Session, Supplement No. 7 (E/2573), annex IB.

> offender than the law in force at the time when the offence was committed, the offender shall benefit thereby.

This was, however, withdrawn at the 1013th meeting and an oral amendment was proposed as follows:

> If, subsequently to the commission of the offence *and before the sentence is passed*, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

The purpose of this amendment was to clarify the apparent ambiguity in the original text. As explained by some delegations,

> . . . the provision as worded could be interpreted to mean that an offender who was already serving a sentence was automatically entitled to have it reduced if the law were revised to specify a lighter penalty for the same offence. It was pointed out that in some legal systems all cases were reviewed at regular intervals and sentences were often reduced. The reduction of the penalty, however, was not and should not be automatic. The judge should decide on such questions on the merits of each case. Moreover, the wording of the provision seemed to indicate that the one applicable penalty should be replaced by another and lighter penalty. In some countries, however, there was not a single penalty, but a scale of penalties for each offence, the actual term of imprisonment being decided by the judge.[19]

Other delegations, however, considered that the operation of the principle underlying the last sentence of paragraph 1 should not be limited to the time when sentence was passed. A milder penal law should apply retroactively to all offenders whether or not they had been sentenced.

The voting on article 15 took place at the 1013th meeting of the Third Committee. All amendments were rejected, including the amendment by the United Kingdom (28 in favour, 34 against with 18 abstentions). Among the supporters of the amendment were Australia, Austria, Belgium, Canada, China, France, Italy, Japan, Netherlands, Norway, Sweden, the United Kingdom and the United States.

Article 15, as a whole, as submitted by the Commission on Human Rights, was adopted by a roll-call vote of 56 to none, with 23 abstentions. Among those countries abstaining were Canada, Italy and the United Kingdom.

As the result is that the original text proposed by the Commission on Human Rights was adopted, few if any definite conclusions can be drawn from these votes. It did not remove the ambiguities and doubts created by the text. Delegations may have preferred to keep it without amendment for very different reasons, for instance, simply because they did not wish to be more precise or did not feel ready to decide questions of interpretations at

19. Official Records of the General Assembly, Fifteenth Session, Agenda item 34, A/4625, 8 Dec. 1960, Report of the Third Committee, p. 4, para. 17.

that stage. It is probable that few had considered all possible difficulties in making the provision mandatory without any limit in time or otherwise. In these circumstances, further research into the earlier history of the text on this point would also be futile. The narrow defeat of the attempt to clarify the text by an explicit limitation to cases in progress (''before the sentence is passed'') in our view cannot prove that an ''opposite'' reading would be more correct.[20] True, it is a little awkward to imply this particular limitation when a majority rejected the proposal to state it explicitly. But that is not the end of the matter, because the only alternative cannot be that there are no limitations. As already suggested, this would lead to manifestly unreasonable results. The national legislator should not be faced with the discouraging choice between not introducing any lighter penalty or reopening the past without limit.

The later history of the provision also contains some elements of interest, because some states ratifying or signing the Covenant have again taken up this controversy from the *travaux préparatoires*. But their great majority have not.

Upon ratification on 17 December 1973, the Federal Republic of Germany made the following reservation:

> Article 15(1) of the Covenant shall be applied in such manner that when provision is made by law for the imposition of a lighter penalty the hitherto applicable law may for certain exceptional categories of cases remain applicable to criminal offences committed before the law was amended.[21]

Upon ratification of the Covenant on 15 September 1978, the government of Italy made a reservation with reference to article 15(1), last sentence:

> . . . the Italian Republic deems this provision to apply exclusively to cases in progress. Consequently, a person who has already been convicted by a final decision shall not benefit from any provision made by law, subsequent to that decision, for the imposition of a lighter penalty.[22]

Upon accession on 21 December 1978, Trinidad and Tobago made the following interpretative declaration:

> With reference to the last sentence of paragraph 1 of article 15 . . . the Government of the Republic of Trinidad and Tobago deems this provision to apply exclusively to cases

20. In its Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Order of 29 January 1971, the I.C.J. stated: ''the fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed. There can be many reasons determining rejection or non-approval''. [1971] I.C.J. Reports 12, at p. 36.
21. CCPR/C/2 of 14 Feb. 1977, p. 5.
22. CCPR/C/2/Add. 2 of 16 March 1979, p. 3.

> in progress. Consequently a person who has already been convicted by a final decision shall not benefit from any provision made by law, subsequent to that decision, for the imposition of a lighter penalty.[23]

In the light of the position taken by Canada and the United Kingdom during the deliberations at the Third Committee of the General Assembly in 1960, it is difficult to understand why they did not make a corresponding reservation or interpretative declaration like those of Italy, the Federal Republic of Germany and Trinidad and Tobago.[24]

The text of article 15(1) therefore can be said to remain ambiguous on this point for all but three of the parties to the Covenant. But it is necessary also to discuss the limitations implied in the various terms used in the text.

Its minimum scope must be that it applies to cases in progress, before the sentence is passed in the first instance. Whether it also applies when the law is changed before judgment is final and after an appeal has been made, seems to be an open question, but any difficulty here would still be manageable. After final judgment it could only be applied as granting a right to a review of the sentence.[25] The practical difficulties in implementing such a right then would increase considerably, at least for sentences already executed or served. Before accepting such a wide interpretation as being implied in a mandatory provision of the Covenant, it should also be considered whether this would not be counterproductive as regards desirable criminal reforms.

The matter would be quite different if the clause were instead regarded as an aid to interpretation of national laws which did not limit their own applicability in time (as the Canadian Act did). It would therefore not be unwise to read the clause as allowing the national legislator to reduce the difficulties inherent in reopening cases or recalculating sentences by fixing a

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23. *Ibid.*, p. 8.
24. After the U.S.A. had signed the Covenant on 5 Oct. 1977, one of the reservations recommended by the Department of State and transmitted to the Senate on 23 Feb. 1978, was: "The United States does not adhere to . . . the third clause of paragraph (1) of Article 15." International Human Rights Treaties, Hearings before the Committee on Foreign Relations, U.S. Senate, Ninety-Sixth Congress, November 14, 15, 16 and 19, 1979 (Washington 1980), p. 524. At the Human Rights Committee's 18th session in New York on 24 March 1983, the representative of the Austrian Government, Mr. Miklali, made the following statement with respect to Art. 15(1), in the course of the consideration of the Report submitted by Austria to the Human Rights Committee under Art. 40 of the Covenant [CCPR/C/SR. 417, p. 3]: "It was a well-established principle of Austrian law that, if the law was changed to provide a lighter penalty between the time when an offence was committed and the time when the case came to trial, the lighter penalty would apply. If it was changed when the case had already been tried, commutation of the sentence ought to be possible, but not automatic: it should not become a general rule. There could be good reasons for upholding the original sentence".
25. In an obiter dictum in its final views in the *Fals Borda* case (R.11/46) the HRC seems, however, to have assumed without further argument that the last clause of para. 1 of art. 15 is inapplicable after the rejection of appeals. These views were adopted at a session between the decisions in the two Canadian cases (reissued in Report of the HRC, *supra*, note 2, at p. 204).

cut-off date, and at least to modify the way in which a sentence is served without applying it to earlier and final sentences. As to the last possibility, it is also arguable that it does not concern the "penalty" itself (below).

(b) "Offender"

One might perhaps think of settling some of the ambiguity by an interpretation of the word "offender". Does not an "offender" cease to be an offender upon the final sentencing, after which he or she becomes a "convicted person"? We do not, however, find this a convincing argument. Although there is no authoritative definition of the term, it could equally well be said, on the contrary, that a person only becomes an "offender" upon being convicted, and only ceases to be an offender when the sentence has been fully served. For the purpose of article 15, the meaning of the term must be determined in the light of all the provisions of the Covenant and not on the basis of national distinctions and definitions. Article 14(2) of the Covenant provides for a presumption of innocence. In this respect every individual prior to conviction is merely a detainee or accused person, or an "alleged offender".

A more direct clue to the meaning of the term "offender" in another part of the Covenant is found in article 10(3) which concerns juvenile "offenders" as contrasted with article 10(2)(b), which deals with "accused juvenile persons". Thus, it would appear that the drafters of the Covenant here understood "offender" to mean not the accused person, but rather the convicted person. The Human Rights Committee has assumed this in its general comments under article 40 of the Covenant.[26] It seems, however, that no fully persuasive argument can be drawn from these contextual observations. One cannot take for granted that the term "offender" is used in a consistent manner in so different provisions.

(c) Retroactivity Depending on the Kind of Penalty?

A realistic approach to the different interpretations of the last clause of article 15(1) would be to examine their merits as applied to the kind of penalty in the particular case. A deprivation of liberty poses other issues than an economic penalty or more drastic measures such as capital or corporal punishment. Both the question of comparing what is "lighter" (below), and the balancing of arguments for or against a retroactive application, might then lead to different conclusions. Thus, for example, even if the death penalty for an offence is abolished only after the sentence is passed but before it is executed, there may be good reasons for letting the offender benefit thereby, especially in view of article 6 of the Covenant which reads in relevant part: "Every human being has the inherent right to life . . . . In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant . . . . Amnesty, pardon or commutation of the sentence of

26. General Comment 9(16) (art. 10), Report of the HRC, *supra*, note 2, pp. 96-7.

death may be granted in all cases." The irreversible character of the penalty is a strong argument for this view. Similarly, in the case of corporal punishment, which can be argued to contravene article 7 of the Covenant ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"), persons awaiting execution of said penalty should benefit by any change in the law providing for the imposition of a lighter penalty.

Contrary to what many may believe, public whipping is still retained in at least one United States jurisdiction as a form of punishment for crimes. The sanction has been sustained against a claim of "cruel and unusual punishment" (Eighth Amendment to the U.S. Constitution).[27] Thus, if the legislature should decide to abolish this kind of punishment, it would seem logical not to carry out an existing sentence, but to allow the offender to benefit from a lighter penalty. A proposed U.S. reservation would, however, make this a moot point.[28]

In this perspective, reversible kinds of penalties such as imprisonment and fines pose different problems. They can be recalculated. The Canadian cases concerned the length of terms to be served and arose while the alleged victims were still in prison. But the extent to which claims for earlier release, compensation for time already served, or for restitution of payment should be considered as just and reasonable under article 15(1) when the law is not changed until after the sentence is passed, in our opinion is highly doubtful. The national law should be allowed to take administrative and judicial economy into account. Equality of treatment is not a reliable yardstick in these matters. If, for instance, the same fines are imposed on two persons and one has paid promptly while the other delays or refuses payment until after the law has reduced the amount which can be imposed, should the latter benefit from the change? Or both?

It seems sufficient to ask such questions to be led once more towards the narrower interpretation as the most reasonable. The offender's right to benefit by a new and lighter penalty exists only until the penalty is imposed, meaning when the sentence is passed. Many factors which should be seen as irrelevant (escape or other refusal to undergo the penalty, etc.) could influence the later events. The effect of such factors should not be a matter of automatic application of article 15(1), but if need be, for pardon etc.

(d) "Penalty" and "Lighter Penalty"

In the end perhaps the most important ambiguity of article 15(1) concerns the very definition of the term "penalty". The kinds referred to above are generally understood as such. But others, such as economic liability, confiscation, extraordinary taxation, loss of rights or privileges, are more difficult to handle. Their purpose and procedural setting do not necessarily qualify them as sanctions against crime. And a subsequent amelioration of an of-

27. Cook, *supra*, note 8, p. 41. *Delaware Code*, Title II, para. 631, 811, 3905-3908.
28. See *supra*, note 23.

fender's position, *e.g.* by pardon, amnesty or parole, is usually not considered as introducing a "lighter" penalty as such. All this is relevant for the interpretation of article 15(1).

In the *Van Duzen* and *MacIsaac* cases, the government of Canada submitted as a general proposition that the word "penalty" in article 15 of the Covenant can only refer to the punishment or sanction decreed by law for a particular criminal offence at the time of its commission. Thus, with respect to a particular criminal act, a breach of the right to a lesser penalty can only occur when there is a reduction of the punishment which can be imposed by a Court. The government distinguished parole by defining it as the authority granted by law to individual inmates to be at large during their terms of imprisonment. It did not reduce the punishment which, according to Canadian law, could be imposed for a given offence; rather, it dealt with the way a sentence was to be served.

Counsel for Mr. Van Duzen and for Mr. MacIsaac submitted, on the other hand, that "penalty" must be interpreted broadly to include forfeiture of parole. They cited the definitions of penalty in various legal dictionaries and maintained that forfeiture or revocation of parole is an integral part of the penal process resulting from conviction and imposition of a sentence of imprisonment and enforced by the agencies executing that sentence. In Canada the Penitentiary Service, the National Parole Board and the National Parole Service are all under the jurisdiction of the Solicitor-General of Canada. They rejected the state party's argument that a penalty within the meaning of article 15(1) is limited to a "criminal penalty" imposed by a criminal court for a particular criminal offence, pursuant to criminal proceedings. "Penalty" clearly entails "punishment for crime" and the critical factors are its relation to the offence and its consequences, not the agency that imposes it.

In both the *Van Duzen* and the *MacIsaac* cases, the Committee left this difficult issue of the meaning of the word "penalty" open and proceeded to dispose of the cases on other issues. It did note, however,

> . . . that its interpretation and application of the International Covenant on Civil and Political Rights has to be based on the principle that the terms and concepts of the Covenant are independent of any particular national system of law and of all dictionary definitions. Although the terms of the Covenant are derived from long traditions within many nations, the Committee must now regard them as having an autonomous meaning. The parties have made extensive submissions, in particular as regards the meaning of the word "penalty" and as regards relevant Canadian law and practice. The Committee appreciates their relevance for the light they shed on the nature of the issue in dispute. On the other hand, the meaning of the word "penalty" in Canadian law is not, as such, decisive. Whether the word "penalty" in article 15(1) should be interpreted narrowly or widely, and whether it applies to different kinds of penalties, "criminal" and "administrative", under the Covenant, must depend on other factors. Apart from the text of article 15(1), regard must be had, *inter alia*, to its object and purpose.[29]

29. *Supra*, note 2, at p. 6. Report of the HRC, pp. 155-56.

We agree with the view of counsel for Mr. Van Duzen and Mr. MacIsaac on one important point. Whatever one may otherwise say of parole, its forfeiture (or revocation) as a result of a recidivist offence ought to be considered as part of the penalty for the latter offence within the meaning of article 15(1). Consequently it would follow from the main principle of that provision that such a measure could not be introduced retroactively if altogether it meant an increased prison term. But one does not have to admit the opposite conclusion in the opposite situation. We shall try to show that this would be fallacious because there is no logical symmetry between these situations.

The prohibition of retroactive application of new or heavier penalties is based on concern for foreseeability and justice, and it operates through a cut-off date, the time of the commission of the act. To avoid abuse, it should not be narrowly interpreted. The retroactive application of a lighter penalty is a reasonable exception, but it is not based on concern for foreseeability. And unless a clear cut-off date in the other end (as proposed by the defeated amendment) is accepted, prescribing such retroactivity as done in article 15(1) entails major complications. True, in some cases (*e.g.* the death penalty and corporal punishment) it is a simple matter if not already executed. But in many other cases difficulties arise, as suggested earlier. Therefore, and in particular as regards such measures as pardons, amnesties, remissions, exercises of mercy, and parole, the prescribed exception should in our view be interpreted as not including them. It must be sufficient that article 15(1) does not prohibit the retroactive application of beneficial changes in such measures, *i.e.* they are allowed, in particular when specifically envisaged by the legislature, but not prescribed. If interpreted otherwise, the provision would require such a complicated re-evaluation of cases and such a burden on the penal system that its application would probably exclude itself in practice.

For these reasons, and not because of any inherent difference between "administrative" and "judicial" matters, we agree with the view that measures such as those in dispute in the Canadian cases, are outside the scope of the last sentence of article 15(1).

Whatever is retained as the proper content of "penalty" in this provision, the next concept, of a "lighter penalty" requires further discussion. Here a few words must suffice. Naturally, the comparison between different kinds of penalties does not always give a clear or objective answer. A short deprivation of liberty may only mean rest, while fines or confiscation in large amounts may mean ruin. It becomes easier when the alternatives are of the same kind. But, for example, does a law providing for better conditions of imprisonment lead to a "lighter penalty", or does it only concern, as in Canada's submission, the way in which the penalty is served?

Some of the ambiguities associated with the concept of "lighter penalty" were already indicated by the Norwegian representative Arvesen at the 1008th meeting of the Third Committee of the General Assembly in November 1960:

> In the first place, the expression "lighter penalty" implied that there was one definite

> penalty, and one alone, for each criminal offence; but under many legal systems, especially in Europe, that was so only in very rare cases. Under the Norwegian Penal Code, the only crime for which a judge had no freedom of choice in fixing the penalty was an attempt on the sovereign's life, for which the only sentence was life imprisonment. For all other offences, the law laid down a minimum and a maximum, and the exact penalty was left, within limits, to the discretion of the court, which was required to take into consideration the circumstances of each case. . . . . , it would still have to be determined in which cases the penalty prescribed by the new law could be termed "less". If the new law provided for a lighter maximum but a more severe minimum, the penalty might be considered milder for the habitual offender, who would be likely to receive nearly the maximum sentence, but it would certainly be less favourable to a first offender. Would the court apply the new law in the first case and the old law in the second, or would it decide in the abstract which of the two laws was the more favourable? Again, if the new law gave the court the option of imposing either a prison sentence or a fine, or both, while the old law provided only for imprisonment, which of the two laws would have to be regarded as more favourable? Practice on that point varied greatly from country to country. . . .[30]

For these reasons the Norwegian delegation submitted an amendment to delete the last sentence of the first paragraph of article 15, which, however, was never put to a vote.

5 CONCLUSIONS

Although the Human Rights Committee in the *Van Duzen* and *MacIsaac* cases found no violation of article 15(1) of the *International Covenant on Civil and Political Rights* and did not say much about its scope, it is hoped that subsequent cases with a different factual situation could lead to a clearer determination, including the Committee's views on the meaning of the terms "offender", "penalty" and "lighter penalty".

In its first five years of practice, the Committee has exercised restraint in its views, which have always been closely predicated on the particular facts of the case under review. Thus no clear precedent on the interpretation of article 15(1) has emerged. The Committee has not understood its function as that of completing the legislative work of the drafters of the Covenant, but merely as that of applying the Covenant as it is to the facts of a particular submission. The *travaux préparatoires* show that the Third Committee of the General Assembly was aware of some ambiguities in article 15 of the Covenant and that the representative of the United Kingdom introduced an amendment that would have eliminated the cardinal ambiguity, that of the apparent lack of an explicit cut-off date. The amendment was rejected in November of 1960 by a close vote and the ambiguity remained. The logical solution for the states concerned would have been to make an appropriate reservation upon accession to or ratification of the Covenant. Only three states have made such reservations. Canada, although voting in favour of the amendment submitted by the United Kingdom in 1960, failed to formulate a reservation when she acceded to the Covenant. Thus for Canada and for 68 other states parties the

30. Official Records of the General Assembly, Fifteenth Session, Agenda item 34, Third Committee, 1008th meeting, 1 Nov. 1960, p. 133, A/C.3/SR. 1008.

scope of article 15(1) remains nearly as uncertain as before, even after the Human Rights Committee's views in the *Van Duzen* and *MacIsaac* cases.

This article has discussed some of the issues somewhat further. It seems to the authors that the duty of states to extend the benefit of a "lighter penalty" retroactively must have inherent limitations despite its broad wording.