

SECTIONS 27(2) AND 27(3)

NO HIGHER PENALTY AND RIGHT TO BENEFIT FROM LESSER PENALTY WHEN PENALTIES CHANGE

Section 27

- (2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.
- (3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.

186

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 27(2) AND SECTION 27(3)?

Compared to many other rights in the Charter, s. 27(2) and s. 27(3) have a clearly defined sphere of operation. You need to consider s. 27(2) and s. 27(3) in assessing legislation, a policy or a program that is relevant to sentencing in criminal law, where it:

- seeks to introduce a new range of sentencing initiatives that expand or reduce the scope of possible sanctions or that impose further restrictions or remove restrictions on convicted offenders;
- seeks to extend the period of detention of persons who have been convicted of an offence;
- alters penalties or penalty levels for offences;
- introduces or makes changes to the orders that can be made on conviction that are in the nature of a penalty.

These policy triggers are not exhaustive.

DISCUSSION

Section 27(2) bars the imposition of greater criminal penalties than would have been imposed at the time the offence was committed.

Section 27(3) gives a person the right to benefit from a lighter punishment if one is provided by law after the commission of the offence.

Experience in other jurisdictions with comparable human rights legislation suggests that these rights are often relevant in the development and vetting of legislation. It is therefore important to clarify how these sections operate and indicate their scope.

These sections should be distinguished from statutory provisions which allow for a greater penalty to be imposed because the offender has a previous conviction for the same type of offence. For example, such provisions operate in the context of serious sexual offences.

Under s. 27(2), a penalty must not be imposed for a criminal offence that is greater than the penalty which applied at the time when the offence was committed.

For example, in the context of international human rights law, the UN Human Rights Committee examined the operation of this right in a case against the Government of Canada. A convicted prisoner claimed that the retroactive introduction of 'mandatory supervision' during parole under the Canadian Parole Act constituted a heavier penalty in breach of the ICCPR. He claimed that the mandatory supervision requirement did not exist at the time he was convicted and sentenced and that the requirement constituted a 'penalty'.

The Committee found the petition to be inadmissible since the prisoner was not a relevant 'victim' of any abuse of his ICCPR rights. The Committee added that mandatory supervision was not a 'penalty' within the meaning of article 15 of the ICCPR. The Committee said:

'... mandatory supervision cannot be considered as equivalent to a penalty, but is rather a measure of social assistance intended to provide for the rehabilitation of the convicted person, in his own interest. The fact that, even in the event of remission of the sentence being earned, the person concerned remains subject to supervision after his release and does not regain his unconditional freedom [the requirement of mandatory supervision] cannot therefore be characterised as the imposition or re-imposition of a penalty incompatible with the guarantees laid down in article 15(1) of the Covenant.'²⁸⁰

However, where the supervision in effect amounts to punishment (for example, by way of detention or effective detention) the right might be engaged.

Section 27(3) is concerned with a decrease in the penalty applicable to an offence. Under this section, any reduction in a penalty that may occur after a person commits an offence, but before he or she is sentenced for that offence, must be applied to the benefit of the accused.

This right has arisen before the UN Human Rights Committee in the context of the liberalisation of parole laws under Canadian criminal law. The committee was asked to consider whether the liberalisation of parole laws should be applied retrospectively. The Committee side-stepped the issue, however, finding that the authors had failed to prove that the retrospective application of the more liberal parole laws would have resulted in their early release in any event.²⁸¹

²⁸⁰ *ARS v. Canada*, Human Rights Committee, Communication No. 91/1981, UN Doc. CCPR/C/14/D/91/1981 (28 October 1981) [5.3].

²⁸¹ *Van Duzen v. Canada*, Human Rights Committee, Communication No. 50/1979, UN Doc. CCPR/C/15/D/50/1979 (7 April 1982); *MacIsaac v. Canada*, Human Rights Committee, Communication No. 55/1979, UN Doc. CCPR/C/17/D/55/1979 (14 October 1982).

These rights only apply in the context of penalties that are imposed following conviction of a criminal offence and have a punitive objective.

What is a penalty?

The principal issue for consideration under these sections is whether a particular measure is a penalty.

You will need to consider if a measure is a penalty. Factors that may be taken into account in assessing whether a measure is a penalty include:²⁸²

- the nature and purpose of the measure;
- its characterisation under law;
- the procedures involved in the making and implementation of the measure; and
- its severity.

Some examples of penalties are:

- fines;
- terms of imprisonment;
- an imposition by a judge of a non-parole period at the time of sentencing;²⁸³
- compensation orders;
- community service orders;
- confiscation of property.

REASONABLE LIMITS ON THE PROHIBITION ON RETROSPECTIVE PENALTIES

The rights in these sections are qualified by section 27(4).

As with all of the human rights protected in the Charter, they may also be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

²⁸² *Welch v. United Kingdom* (1995) 307 Eur Court Hr (ser A); (1995) 20 EHRR 247.

²⁸³ *R v. Pora* [2001] 2 NZLR 37.

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KEY POINTS TO REMEMBER

- These rights arise frequently in the development and vetting of legislation.
- Criminal law penalties must not be applied retrospectively.
- A penalty must not be imposed for a criminal offence that is greater than the penalty applying at the time the offence was committed.
- Any reduction in a penalty that may occur after a person commits an offence, but before he or she is sentenced for that offence, must be applied to the benefit of the accused.
- Both sections only apply to criminal penalties.
- The term 'penalty' is not restricted to fines or terms of imprisonment.
- The imposition by a judge of a non-parole period at the time of sentencing is likely to be regarded as a penalty.
- If you are considering whether a measure amounts to a penalty, consider the following factors:
 - the nature and purpose of the measure;
 - its characterisation under law;
 - the procedures involved in the making and implementation of the measure; and
 - its severity.

MEASURES TO IMPROVE COMPLIANCE

- In relevant circumstances, ensure that all Bills have transitional provisions which clarify the application of any altered offence or altered sentencing regime.

RELATED RIGHTS AND FREEDOMS

If your policy or legislation raises an issue under s. 27(1), check whether it also raises an issue under the following rights and freedoms:

- The right to a fair trial (s. 24);
- Rights in criminal proceedings (s. 25); and
- No retrospective criminal laws (s. 27(1)).

HISTORY OF THE SECTION

This provision is modelled on article 15(1) of the ICCPR.

BIBLIOGRAPHY

Case Law

1. *R v. Pora* [2001] 2 NZLR 37.
2. *Welch v. UK* (1995) 307 Eur Court Hr (ser A).

United Nations Human Rights Committee Jurisprudence

3. *ARS v. Canada*, Human Rights Committee, Communication No. 91/1981, UN Doc. CCPR/C/14/D/91/1981 (28 October 1981).
4. *MacIsaac v. Canada*, Human Rights Committee, Communication No. 55/1979, UN Doc. CCPR/C/17/D/55/1979 (14 October 1982).
5. *Van Duzen v. Canada*, Human Rights Committee, Communication No. 50/1979, UN Doc. CCPR/C/15/D/50/1979 (7 April 1982).