Protection against Retroactive Penal Laws and Penalties as Guaranteed by the Constitutions of South-Asian States and the European Convention on Human Rights

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Abstract

This paper examines the nature and scope of the right against ex post facto penal legislation as guaranteed by the Constitutions of five South-Asian States, namely, India, Sri Lanka, Pakistan, Bangladesh and Nepal. These Constitutional guarantees are also compared with the corresponding guarantee of the European Convention on Human Rights with a view to ascertaining whether the guarantees of the South-Asian Constitutions are of acceptable international standard. The paper begins with an investigation of the relevant Constitutional provisions and judicial practices of the South-Asian States concerned. It then moves on to examine the European jurisprudence pertinent to the right under consideration. Finally, a comparison about how the guarantee is interpreted and applied under the South Asian Constitutions and the European Convention on Human Rights is made.

In a civilized society people should be able to plan their activities with a reasonable certainty of the legal consequences. Such planning would become impossible if acts and omissions, which were not punishable at the time of their occurrence, were made punishable by the laws enacted subsequent to the commission of the act or omission. As a basic principle people have a right to fair warning of conduct which will give rise to criminal liability and punishments. It is against the common sense of justice to alter the criminal quality attributable to an act or omission after the commission of the act or omission. It is also against the common sense of justice to impose upon an offence a penalty greater than the one prescribed by the laws in force at the time of the commission of the offence. As early as in 1651, Thomas Hobbes wrote in Leviathan – the crowning achievement in Hobbes's political science - "...when a penalty, is either annexed to the Crime in the Law it self, or hath been usually inflicted in the like cases; there the delinquent is Excused from a greater penalty...No Law made after a Fact done, can make it a crime".[1] In the 18th Century both the French Declaration of the Rights of Man[2] and the American Constitution[3] contained provisions which prohibited the application of penal laws with retrospective affect. The formulation of the maxim nullum crimen, nulla poena sine praevia lege poenali"

[1] Thomas Hobbes, *Leviathan*, Penguin Books (1985), p.339.
[2] Article 8
[3] Article 1 Section 9(3)

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(no crime committed, and no punishment meted out, without a violation of penal law as it existed at the time) by Paul Johann Anselm Ritter von Feuerbach paved the way for the Bavarian Code of 1813 to prohibit ex post facto *penal legislation. In the 20th Century the principle against retroactive penal laws found its place in almost all the major international human rights documents elevating it to a universally accepted fundamental human right.*[4] *Thus, making sure that the responsibilities and restrictions of penal laws will not apply to acts committed prior to the enactment of the penal law is at present, not only an exigency of justice and human rights, but also an important public policy which prevents unnecessary inconvenience and chaos in day to day social life.*

In the South Asian region, India, Sri Lanka, Pakistan, Bangladesh and Nepal have all constitutionally guaranteed to their citizens a right against ex post facto *penal legislation. This paper examines the nature and scope of these Constitutional guarantees, and compares them with the corresponding guarantee of the European Convention on Human Rights with a view to ascertaining whether the guarantees of the South-Asian Constitutions are of acceptable international standard. The paper begins with an investigation of the relevant Constitutional provisions and judicial practices of the South-Asian States concerned. It then moves on to examine the European jurisprudence pertinent to the right under consideration. Finally, a comparison about how the guarantee is interpreted and applied under the South Asian Constitutions and the European Convention on Human Rights will be made.*

1. South Asia

1.1 India

As provided by Art.20(1) of the Constitution of India "(n)o person shall be convicted of any offence except for violation of a law in force at the time of the commission of that act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence." The provisions here deal with '*ex post facto laws*', albeit that expression is not specifically mentioned.[5] Also, it should be noted that, as the Supreme Court of India has determined, even though the legislature has power to legislate retrospectively, creation of an "offence" for an act which at the time of its commission was not an offence, or imposition upon a wrongdoer a "penalty" greater than that which was provided under the law existent at the time of committing the wrong, would be violative of the guarantee of Art.20(1).[6]

[4] See, *inter alia*, Art.11(2) of the Universal Declaration of Human Rights, Art.15 of the International Covenant on Civil and Political Rights, Art.7 of the Convention fot the Protection of Human Rights and Fundamental Freedoms (in Europe), Art.9 of the American Convention on Human Rights, Art.7(2) of the African Charter on Human and Peoples' Rights.

[5] See, G.P.Nayyar v. State (Delhi Administration), A.I.R. 1979 S.C. (Vol.66) 602 p.606 para.7.

[6] Ibid.

Neither the word "offence" nor "penalty" is defined in the Indian Constitution. However, as stipulated by Art.367 of the Constitution, unless the context otherwise provides, for words which are not defined in the Constitution the meaning assigned in the General Clauses Act, 1897 may be given. According to Sec.3(38) of the said Act, an offence is an act or omission made punishable by any law for the time being in force. Also, as the marginal note of Art.20 of the Constitution connotes, the Article concerns 'protection in respect of conviction for offences'. Thus, according to Venkataramiah J. in the case of Shiv Dutt Rai Fateh Chand v. Union of India[7], the guarantee of Art.20(1) can be invoked by only those who are charged with a crime before a criminal court.[8]

Further, although the word "penalty" can be given a wider interpretation so as to include, for example, even the recovery of an amount as a penal measure in a civil proceeding, within the context of Art.20(1), the word has been used in a narrower sense as meaning a payment which has to be made, or a deprivation of liberty which has to be suffered, as a consequence of a finding that the person accused of a crime is guilty of the charge.[9] Thus, a law which creates a civil liability with retrospective effect would not *per se* come within the purview of Art.20(1), even if the failure to discharge the liability entails imprisonment, unless the law itself has classified the failure as an offence.[10] Accordingly, levy of charges for unauthorized use of water enforced retrospectively with enhanced effect is not against the guarantee of Art.20(1).[11] Nor is the retrospective levy of penalties effected under Income Tax Acts[12] or under sales tax laws.[13]

Art.20(1) only prohibits the conviction of a person or his/her being subjected to an enhanced penalty under *ex post facto* laws. A trial under a procedure different from what was existent at the time of the commission of the offence or trial by a court different from that which had competence at the time is not *ipso facto* against the guarantee of Art.20(1). As was held in the case of Shiv Bhadur Singh v. State of Vindhya Pradesh[14], a person accused of committing an offence has no fundamental right to trial by a particular court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved.[15] According to the Supreme Court of India a rule of evidence is a matter of procedure.[16]

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[7] (1983) 3 S.C.C. 529 at pp.552-553 para.25.

[8] The guarantee of Art.20(1) is not applicable even to disciplinary proceedings [see, Poundurang Swamy v. State of Andhra Pradesh, A.I.R. 1971 (Andhra Pradesh) 243].

[9] Ibid.. Also see, Maqbool Hussain v. The State of Bombay, 1953 S.C.R. 730.

[10] See, M/s Hatisingh Manufacturing Co. Ltd. v. Union of India, (1960) 3 S.C.R. 528.

[11] See, Jawala Ram v. State of Pepsu, (1962) 2 S.C.R. 503.

[12] See, Raghunandan Prasad Mohan Lal v. I.T.A.T., A.I.R. 1970 (Allahabad) 620.

[13] See, Shiv Dutt Rai Fateh Chand v. Union of India, (1983) 3 S.C.C. 529. However, for an opposite view, see, Rai Bahadur Hurdut Roy Moti Lall Jute Mills v. State of Bihar, A.I.R. 1957 (Patna) 1.

[14] A.I.R. 1953 S.C. 394.

[15] Also see, Public Prosecutor v. K.C.Ayyappan Pillai, 1953 Cr.L.J. 625.

[16] See, G.P.Nayyar v. State (Delhi Administration), A.I.R. 1979 S.C. (Vol.66) 602.

[17] See, Shiv Bhadur Singh v. State of Vindhya Pradesh, A.I.R. 1953 S.C. 394; Rama Shanker Tewari v. State, 1954 Cr.L.J. 1212; *In re* Linga Reddy Venkatareddy, 1956 Cr.L.J. 29.

[18] See, Chief Inspector of Mines v. Lala Karam Chand Thapper, 1961 S.C.R. (Vol. I) 9. Also see, Abdul Haleem v. State, 1962 (2) Cr.L.J. 414 - a retrospective effect accorded to a definition which made a person "foreigner" who was not a foreigner at the time of his entry to India liable to prosecution is against the guarantee of Art.20(1).

The phrase "law in force" as used in Art.20(1) is understood in its natural sense as being the law in fact in existence and operation, not the law deemed to have become operative, at the time of the alleged act or omission.[17] If an act or omission is not an offence under the laws in operation at the time of its occurrence, subsequent legislations or amendments cannot make that act or omission culpable.[18] However, a law punishingacontinuing offence is not hit by the prohibition of Art.20(1). That is to say, if a continuingact or omission is made illegal by a penal law, the act or omission can be held punishable from the moment of the penal law's coming into force, albeit until that moment it was an innocent act or omission.[19]

What offends Art.20(1) is the retrospective creation of penal offences or the imposition of a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.[20] Thus, retrospective legislation or retrospective application or interpretation of laws is not altogether prohibited by the Constitution. In particular, an *ex post facto* law which only mollifies the rigour of a criminal law does not fall within the prohibition of Art.20(1). In other words, retrospective legislation or retrospective application or interpretation of penal laws, in so far as the same is beneficial to the accused, is not violative of the guarantee of Art.20(1).[21]

1.2 Sri Lanka

As provided by Art.13(6) Constitution of Sri Lanka,

"(n)o person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.

Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.

It shall not be a contravention of this Article to require the imposition of a minimum penalty for an offence provided that such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed."

[19] See, Akharbhai v. Md. Hussain Bhai, 1961 (1) Cr.L.J. 266. Note, in such a situation, previous acquittal cannot operate as a bar to subsequent prosecution (see, G.D.Bhattar v. State, 1957 Cr.L.J. 834).

[20] See, Kedar Nath v. State of West Bengal, A.I.R. 1953 S.C. 404; Pralhad Krishna v. The State of Bombay, 1952 Cr.L.J. 81.

[21] See, Rattan Lal v. The State of Punjab, A.I.R. 1965 S.C. 444; T. Baral v. Henry An Hoe, (1983) 1 S.C.C. 177.

[22] This provision is identical to Art.15(2) of the International Covenant on Civil and Political Rights.

Only the first part of this Article guarantees a right to the accused persons. The second and third parts lay down two exceptions to the guarantee of the first part. Apparently the second part is intended at filling the lacunae in domestic penal laws. It permits the trial and punishment of any person for any act or omission which, at the time when it was committed, was a crime under the general principles of law recognised by the community of nations[22], irrespective of the legal status of the act or omission under thedomestic law.[23] As provided by the third part of the Article, the imposition of a minimum penalty is not against the guarantee of the first part as long as such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed.

As the overall design of Art.13(6) suggests, the words "offence" and "penalty" in the Article contemplate the criminal offences proper and the sanctions of punitive nature respectively. Hence, the guarantee of Art.13(6) would not be applicable, for example, in the case of proceedings initiated under a tax Statute or if the penalty concerned is of revenue nature.[24] Further, according to former Chief Justice of Sri Lanka, S.Sharvananda, trial under a procedure different from what prevailed at the time of the commission of the offence or by a court different from that which was competent at that time is also not against the guarantee of Art.13(6) of the Constitution. As he goes on to observe;

"(l)aws which alter rules of criminal procedure but do not affect the substantive rights of the accused are not violative of the ex post facto clause even though the legislature makes the change during the course of the trial...A change of procedure is not prohibited as no one has a vested right in procedure. An accused cannot object if the procedure at the time of the trial or conviction is different from what it was at the time of the commission of the offence. A rule of evidence is a matter of procedure..."[25]

As Jayampathy Wickramaratne has noted[26], a retrospective law that changes the procedure or punishment to the advantage of the accused is not an *ex post facto* law. So is a law that enhances punishment on proof of a previous conviction even though the previous was prior to the passing of that law.

It must be noted that the guarantee of Art.13(6) relates only to conviction and sentencing, which obviously are judicial acts, under *ex post facto* laws. In the light of the present Constitutional framework of Sri Lanka, fundamental rights can be enforced only against executive or administrative action. Therefore, it is doubtful whether in reality the fundamental right guaranteed by Art.13(6) is a practical or an enforceable one.

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[23] See, "Sepala Ekanayake Cases" – Sepala Ekanayake v. the Attorney General, C.A. 132/84, decided on 7th August 1986; Attorney General v. Sepala Ekanayake, 1 Sri L.R. 41 (1982)

[24] See, S.Sharvananda, *Fundamental Rights in Sri Lanka - A Commentary* (1993), p.162.

[25] Ibid., p.161.

[26] See, Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka*, (New Delhi: Navrang Booksellers and Publishers 1996), p.317.

1.3 Pakistan

As enjoined by Art. 12 of the Constitution of the Islamic Republic of Pakistan,

"(1) No law shall authorise the punishment of a person

(a) for an act or omission that was not punishable by law at the time of the act or omission; or

(b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.

(2) Nothing in clause 1 or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, an offence."

A plain reading of the Article suggests that it prohibits only the punishment, not the conviction, under *ex post facto* laws. However, it has been held that both conviction as well as punishment under *ex post facto laws* is against the guarantee of Art. 12.[27]

The words like "punishment", "offence", "penalty", etc., used in Art. 12 indicate that the guarantee of the Article applies only in the field of criminal law. Thus, it is only retrospective criminal legislation,

(i) which authorizes the punishment of a person for an act or omission that was not punishable by law at the time of the act or omission or,

(ii) which authorizes the punishment of a person for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed

that comes within the mischief of Art. 12. Imposing, or enhancing the degree of a civil liability retrospectively would not attract the guarantee of Art 12.[28] However, as Sharifuddin Pirzada has noted, the constitutional prohibition may not be evaded by giving a civil form to a measure, which is essentially criminal.[29]

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[27] See, Bhai Khan v. State, 1992 S.C. 14. Also see, Shafi Ahmad v. The State, 1977 P.Cr.L.J. 717.

[28] See, Government of Pakistan v. Akhlaque Hussain and West Pakistan Province, P.L.D. 1965 S.C. 527; Saheb Mia Chowdhury v. S.M. Mia, P.L.D. 1966 Dacca 439; Ghous Bakhsh Bizenjo v. Islamic Republic of Pakistan, P.L.D. 1976 Lahore 1504. However, some writers seem to disagree with this narrow definition given to Art. 12. As they argue the word "punishment" is wide enough to encompass civil disabilities and disqualifications for professions, trades, elections, etc. [see, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.288; Emmanuel Zaffar, *Constitution of the Islamic Republic of Pakistan 1973*, Vol. I (Lahore: Ifran Law Book House 1992/93), p.177].

[29] See, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan*, (Lahore: All Pakistani Legal Decisions, 1966), p.212.

[30] See, State Bank of Pakistan v. Raza Enterprises, 1990 P.Cr.L.J. 317.

[31] See, Jamilus Sattar v. Chief Election Commissioner, P.L.D. 1964 Dacca 788; Mehr Khan v. Razia Begum, 1978 S.C.M.R. 294.

As stipulated by Art.12(1)(a), a subsequent law cannot punish an act or omission which was not an offence when it was committed.[30] Neither can a subsequent law prescribe for an offence a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.[31] As Munir has observed,

> "(o)n the plain words of the provision, the change of one kind of punishment by another would *prima facie* be invalid, because the expressions 'greater than' and 'of a kind different from' are used disjunctively. The new penalty may be lesser than the original penalty, but if it is of a different kind, the accused may object to it. But this does not mean that in that case he would escape punishment altogether. If he objects to the new penalty, the original penalty may be imposed on him, because the new penalty being void the previous penalty would stand unimpaired...if there is a change in the kind of punishment, it is immaterial whether it is favourable or unfavourable to the accused. He has a constitutional right to object to the changed penalty..."[32]

This, however, does not mean that a law, which mitigates the severity but does not change the nature of a punishment with retrospective effect, is hit by the prohibition of Art.12.[33]

A statute depriving an accused of the discretion given to the court under the law in force at the time of the offence to pass any sentence between the maximum and the minimum sentences, by fixing his/her sentence at a definite term, even if the term so fixed is less than the maximum prescribed by the law in force at the time of the offence, operates to increase the punishment.[34] So does a statute shortening the time within which execution shall take place after sentence.[35] Also, amendment of prison regulations relating to remission, which in effect increases the period of imprisonment to a larger term than the period prescribed by such regulation on the date of the commission of the offence, is also violative of the guarantee of Art.12(1)(b).[36]

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[32] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.289.

[33] See, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan*, (Lahore: All Pakistani Legal Decisions, 1966), p.216.

[34] Ibid..

[35] See, Emmanuel Zaffar, *Constitution of the Islamic Republic of Pakistan 1973*, Vol. I (Lahore: Ifran Law Book House 1992/93), p.176.

[36] See, Farid Khan v. The State, P.L.D. 1965 (W.P.) Peshawar 31.

[37] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.287; Emmanuel Zaffar, *Constitution of the Islamic Republic of Pakistan 1973*, Vol. I (Lahore: Ifran Law Book House 1992/93), p.176.

[38] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, ibid., p.286.

[39] As was held in the case of Bazal Ahmad Ayyubi v. West Pakistan Province [P.L.D. 1957 (W.P.) Lahore 388 at p.398], no one has vested rights in procedure. Also see, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, ibid., p.282.

On the other hand, Art.12(1) is not a bar for a statute to enhance the punishment for a second or subsequent offence. The fact that the prior offence occurred before the statute in question was enacted or became effective does not render it repugnant to the guarantee of Art.12.[37] Similarly, a law that makes an act or omission, which commenced to be committed prior to but continues to be committed even after the date the law became operative, punishable, or a law which imposes a greater penalty on a continuing offence, is also not against the guarantee of Art.12.[38] Moreover, the prohibition against *ex post facto* legislation in Art.12 does not prevent the legislature from making changes in the procedural laws or making changes relating to the jurisdiction and composition of judicial tribunals with retrospective effect.[39] Such changes remain valid so long as theydo not impair the substantial protections afforded to the accused by the laws in force at the time of the alleged offence.[40]

1.4 Bangladesh

As guaranteed by Art.35(1) of the Constitution of the Peoples' Republic of Bangladesh, "(n)o person shall be convicted except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence." The provisions of this Article relates only to penal conviction and sanctions.[41] However harsh its consequences may be, a law does not come within the prohibition of Art.35(1) unless it inflicts a criminal punishment. On the other hand, as Mahmudul Islam has noted, the form of the penalty is not conclusive and the prohibition of this provision cannot be evaded by giving a civil form to a penalty, which is essentially criminal in nature.[42]

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[40] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, ibid., p.288; Emmanuel Zaffar, *Constitution of the Islamic Republic of Pakistan 1973*, Vol. I (Lahore: Ifran Law Book House 1992/93), p.176.

[41] For a somewhat different view see, Registrar, University of Dacca v. Dr. Syed Sajjad Hussain and others, and University of Dacca v. Dr. Mohar Ali, D.L.R. (1982) Vol.34 p.1.

[42] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.181.

[43] See, F.K.M.A., *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), pp.69-70.

[44] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.181.

[45] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), p.69.

The first part of Art.35(1) prohibits the making of an act or omission, which when occurred was not a violation of any of the laws in force, an offence by a subsequent law. The phrase "law in force" in Art.35(1) is understood in its natural sense as being the law in fact in existence and in operation at the time of the alleged act or omission as distinct from the law 'deemed' to have become operative.[43] According to Mahmudul Islam,

> "(i)n determining whether a law imposes punishment for past conduct in violation of the prohibition, the test is whether the legislative aim is to punish an individual for past activity or whether the restriction comes about as a relevant incident to a regulation of a present situation. A law does not come within the prohibition of Art.35(1) by providing punishment or penalty for the continued maintenance of certain conditions which, prior to enactment of the law, were lawful."[44]

Also, what is prohibited here is the conviction and/or imposing a penalty under an *ex post facto* law. Therefore, changes in the procedural laws with retrospective effect would not infringe the guarantee of Art.35(1).[45]It is against the second part of the guarantee of Art.35(1) to impose upon an offence a penalty greater than, or a penalty different from, that which might have been inflicted under the law in force at the time of the commission of the offence. The question whether a change in the penalty has made it greater or different is determined from the perspective of a reasonable person. A new penalty would come within the mischief of Art.35(1) if a reasonable person would regard it as one which is different from, or as one which is more severe than, the one which the law in force at the time of the offence might have prescribed. Nonetheless, retrospective application of changes which reduce the severity of a punishment or, which introduce a humane method of execution of a punishment is not against the guarantee of Art.35(1).[46]

1.5 Nepal

According to Art.14(1) of the Constitution of the Kingdom of Nepal "(n)o person shall be punished for an act which was not punishable by law when the act was committed, nor shall any person be subjected to a punishment greater than that prescribed by the law in force at the time of the commission of the offence." What the first part of this guarantee prohibits is the punishment under *ex post facto* laws.[47] However, albeit not specifically mentioned, the prohibition presumably extends also to cover convictions under such laws. The second part of Art.14(1) makes it unconstitutional to inflict upon an offender a punishment greater than that prescribed by the law in force at the time of the commission of the offence.

10-2006-06-0782-OUP-500

2. European Convention on Human Rights

As provided by Art.7 of the European Convention on Human Rights,

"(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a crime 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 the criminal offence was committed.

(2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations."

The effect of this Article is threefold. Firstly, the Article places limitations on the legislatures of the member states of the European Convention on Human Rights by prohibiting the retroactive creation of penal laws.[48] Secondly, it precludes the domestic criminal courts of the member states from extending with retrospective effect by way of interpretation the scope of existing criminal laws.[49] Thirdly, it prohibits the imposition of a heavier penalty on a criminal offence than the one that was applicable at the time the alleged offences was committed.[50]

A closer examination of Art.7(1) reveals that it makes no distinction between an act or omission which 'did not yet' constitute a criminal offence and an act or omission which 'no longer' constituted one. Accordingly, convicting a person under an obsolete provision of criminal law would be contrary to the Convention as much as conviction under an *ex post facto* penal law. As the European Commission of Human Rights[51] said in the case of X v. The Federal Republic of Germany, Art.7

[46] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.182.

[47] See, Kusum Shrestha, 'Fundamental Rights in Nepal', *Essays on Constitutional Law*, Vol.15 (1993), Nepal Law Society, Kathmandu, t pp.18-19.

[48] See, A.H.Robertson and J.G.Merrills, *Human Rights in Europe*, 3rd Edition (Manchester: Manchester University Press 1994), p.126.

[49] See, for example, App.No.8710/79, X Ltd. and Y v. UK, 28 D & R (1982) 77; App.No.10038/82, Harriet Harman v. The United Kingdom, 38 D & R (1984) 53.

[50] See, for example, Jamil v. France, 21 EHRR (1996) 65.

"...does not merely prohibit - except as provided in paragraph 2 - retroactive application of the criminal law to the detriment of the accused...it confirms, in a more general way, the principle of statutory nature of offences and their punishment ('*nullum crimen, nulla poena sine lege*')...it prohibits, in particular, extension of the application of the criminal law '*in malam partem*' by analogy...the principle of statutory nature of offences and their punishment implies that a person cannot be held guilty under an obsolete law if the act of which he is accused were performed after the abrogation of that law because a conviction in these circumstances would relate to 'an act or omission which did not constitute a criminal offence under national...law at the time when it was committed'...it is immaterial whether the abrogation of a criminal law be express or implicit, provided that the latter form of abrogation is known to the municipal law of the State concerned."[52]

The aforesaid principle of 'statutory nature of offences and punishment' does not exclude the possibility of crimes based on common law principles. Any conclusion to the contrary would strike a serious blow to the legal systems of those Member states with common law traditions. As the European Court of Human Rights[53] observed in the Sunday Times Case[54] it would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not 'prescribed by law' on the sole ground that it is not enunciated in legislation. In X Ltd and Y v. UK[55] the applicants had been found guilty of the common law offence of blasphemous libel. While conceding that not only written statutes but also rules of common law or other customary law may provide a sufficient legal basis for the criminal convictions envisaged in Art.7, the Commission said,

"...this branch of the law presents certain particularities for the very reason that it is by definition law developed by the courts, it is nevertheless subject to the rule that the law making function of the courts must remain within reasonable limits. In particular in the area of criminal law it is excluded, by virtue of Art.7(1) of the Convention, that any acts not previously punishable should be held by the courts to entail criminal liability, or that existing offences should be extended to cover facts which previously clearly did not constitute a criminal offence. This implies that constituent elements of an offence such as e.g. the particular form of culpability required for its completion may not be essentially changed, at least not to the detriment of the accused, by the case law of the courts. On the other hand it is not objectionable that the existing elements of the offence are clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence."[56]

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[51] Hereafter referred to as the Commission.

[52] See, App.No.1169/61, X v. Federal Republic of Germany, 6 YBECHR (1963) 520 pp.586-588. Also see, App.No.7721/76, X v. Netherlands, 11 D & R (1978) 209.

[53] Hereafter referred to as the Court.

[54] 2 EHRR (1979/80) 245 p.271 para.47 - this case concerned Art.10 of the Convention.

[55] App.No.8710/79, 28 D & R (1982) 77.

Nonetheless, analogous application of norms creating criminal liability, through extensive interpretation, to acts or omissions for which the norms are not intended to be relevant, is prohibited under Art.7, unless the particular analogous application favours the person concerned.[57] This implies that in order to conform to Art.7 domestic laws, which impose criminal liability, should be interpreted restrictively.[58]

Art.7(1) requires the laws creating criminal offences, whether statutory or common law, to be clear and unambiguous. They must also be adequately accessible and formulated with sufficient precision to enable the citizens to regulate their conduct. Interpretation of such laws should always be reasonably foreseeable.[59] According to Judge Martens,

> "...the requirement that a legal definition of a crime be drafted as precisely as possible is not a consequence of but part and parcel of the principle enshrined in Art.7(1)...this requirement serves not only... the aim of enabling the individual to know 'what acts and omissions will make him liable', but is indeed - in accordance with its historical origin -also and *primarily* to secure the individual adequate protection against arbitrary prosecution and conviction: Art.7(1) demands that criminal law should be compatible with the rule of law."[60]

This, however, does not mean that Art.7(1) is breached unless the concrete facts which gave rise to criminal liability have been set out in detail in the statutory provision or the common law principle involved. According to the Commission Art.7 remains intact as long as it is possible to determine from the relevant statutory provision or the common law principle what act or omission is subject to criminal liability, even if such determination derives from the courts' interpretation of the provision or the principle concerned.[61] With regard to certainty and foreseeability the Court in the Sunday Times Case said:

"...the consequences which a given action may entail...need not be foreseeable with absolute certainty: experience shows this to be unattainable...whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent are vague and whose interpretations and application are questions of practice." [62]

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[56] Ibid. p.81 para.9. Also see, SW v. United Kingdom, and CR v. United Kingdom, 21 EHRR (1996) 363.
[57] See, Judgment of 25th May 1993, the Case of Kokkinakis v. Greece, Ser.A Vol.260-A (1993) p.22 para.52. Also see, G v. France, 21 EHRR (1996) 288.
[58] See, App.No.1103/61, X v. Belgium, 5 YBECHR (1962) 168 p.190; App.No.5327/71, X v. The United Kingdom, 43 CD (1973) 85 p.89. Also see, App.No.4161/69, X v. Austria, 13 YBECHR (1970) 798.
[59] See, the Sunday Times Case, 2 EHRR (1979-80) 245 p.271 para.49.
[60] Partly Dissenting Opinion of Judge Martens, the Case Kokkinakis v. Greece, Ser.A Vol.260-A (1993) pp.33-34 para.4.

First sentence of Art.7(1) prohibits the "conviction" of a person "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". In the Lawless case both the Commission and the Court emphasized on the need of a conviction based on a retroactive penal law for the application of Art.7. In this case the Applicant, who was a member of the IRA (Irish Republican Army), had at least one previous conviction in connection with subversive activities. In the circumstances that gave rise to the application in consideration, the Applicant was arrested on 11th July 1957 and kept in detention till 11th December the same year without a trial under an order made by the Minister for Justice. The detention order had been made pursuant to the special powers of detention without trial conferred upon the Minister by the Offences Against the State (Amendment) Act 1940, which had been brought into operation on 8th July 1957 by a proclamation of the Irish Government. The Applicant submitted that, when signing the warrant of detention, the Minister had, contrary to the provisions of Art.7, taken into consideration matters alleged to have occurred before 8th July 1957. It was argued that, if the substance rather than the form of 1940 Act were considered, detention under that Act would constitute a penalty for having committed an offence and the offence to which the 1940 Act relates were not punishable before 8th July 1957, when the Act came into operation. He further asserted that if he had been convicted of the alleged offences by an ordinary court, he would in all probability have been sentenced to less severe penalties which would have been subject to review on appeal in due course of law.

However, neither the Commission nor the Court was impressed by these arguments. It was held that Art.7 did not apply to the circumstances of the case, because the Applicant had been detained for the sole purpose of restraining him from engaging in activitiesprejudicial to the public order or the security of the State. Such a preventive measurewas not regarded as a conviction on a criminal charge within the meaning of Art.7.[63] The Commission in its Report said:

[61] See, App.No.5493/72, Handyside v. The United Kingdom, 45 CD (1974) 23 p.49.

[62] 2 EHRR (1979/80) 245 p.271 para.9. Normally it is not the task of the European Court of Human Rights to ascertain whether a proper interpretation has been given to municipal law by the domestic courts. However, the situation is otherwise in matters where the convention expressly refers to municipal law, as it does in Art.7. According to the Court "(i)n such matters disregard of the domestic law entails breach of the Convention, with the consequence that the Court can and should exercise certain power of review." [see, Winterwerp v. Netherlands, 2 EHRR (1979-80) 387, p.405 para.46]. In order to determine whether a municipal law has been interpreted extensively or applied in a manner that is unforeseeable, it may become necessary for the European Court to depart from its normal practice and give the municipal law an autonomous interpretation and examine the interpretation given by domestic courts against it. Nevertheless, this purely supervisory function is undertaken with caution in order to avoid conflict with domestic courts which stand *vis-à-vis* the European Court and are not hierarchically inferior to them. Also see, App.No.1852/63, X v. Austria, 8 YBECHR (1965) 190 pp.198-200; App.No.5327/71, X v. The United Kingdom 43 CD (1973) 85 p.89.

"the Applicant was not detained as a result of a conviction on a criminal charge, nor was his detention a 'heavier penalty' within the meaning of Art.7. Moreover, Section 4 paragraph (I) of the Act of 1940 under which the Applicant was detained, provides that the Minister of State must be of the opinion that the person ordered to be detained *is* engaged in activities which in his opinion, *are* prejudicial to the preservation of public peace and order or to the security of the State. It is, therefore, clear that a person is only liable to be detained under...the Act of 1940 if a Minister of State is of the opinion that the person in question *at a date subsequent to the power of detention conferred by Section 4 being brought in to force* is engaged in activities prejudicial to the preservation of public peace and order or the security of the State. Accordingly, there is no question of Section 4 being retroactive in this question."[64]

In X v. The Federal Republic of Germany[65] it was argued that the authorities of the FRG had violated the provisions of Art.7 when they entered on the Applicant's 'Strafregister' a previous conviction given by the Courts of East Germany since the act which gave rise to that conviction did not constitute a crime under the law of the FRG. Rejecting this argument the Commission said;

"...this complaint...is based upon the misconception of the measure of inscribing a previous conviction upon a person's 'Strafregister'...the inscription on the Applicant's 'Strafregister' of his previous conviction...cannot legitimately be considered as meaning that he was put on trial by the authority inscribing the conviction on his 'Strafregister' and 'held guilty of a criminal offence' within the meaning of Art.7 of the Convention."[66]

[63] See, Lawless Case (Merit), Judgment of 1st July 1961, Ser. A (1960-61) p.51. For the opinion of the Commission see, App.No.332/57, Lawless v. The Republic of Ireland, Report of the Commission, Ser. B; Pleadings, Oral Arguments and Documents 1960-1961, p.9.

[64] Ibid., the Report of the Commission, p.67.

[65] App.No.448/59, 3 YBECHR (1960) 254.

[66] Ibid., p.270.

[67] According to Art.25 of the European Convention on Human Rights, which sets down the right of individual application, only 'a person non governmental organization or group of individuals claiming to be the *victim* of a violation' has the right to bring an action. On the other hand, there is no such requirement in Art.24, which deals with the inter-state applications. Accordingly, a state may bring an application questioning *in abstracto* the compatibility with Art.7 the law of another state. Not even a prosecution is required for such applications to be valid. See the case brought by Ireland against the United Kingdom [App.No. 5451/72, 15 YBECHR (1972) 228; Judgment of 18th January 1978, Ser.A Vol.25 p.91 para.248]. Also see, P.Van dijk and G.J.H.van Hoof, *The Theory and Practice of the European Convention on Human Rights*, second edition (Deventer: Kluwer Law and Taxation Publishers 1990). They argue that "[i]n specific cases, however, the mere existence of a criminal law provision, even when it has not yet been applied in a concrete case, may hinder a person much in his freedom of action that he can already be regarded as a victim."

It follows that a conviction based upon a retroactive penal law is necessary, at least in the case of individual applications, to raise an issue under Art.7.[67] Thus, a decision to extradite a person[68], or the detention of a person as a vagrant would not fall within the scope of Art.7.[69] Similarly, compelling someone to retire early does not constitute holding that person guilty of an offence within the meaning of Art.7.[70] Nor would a person against whom criminal proceedings are pending be considered as having been 'held guilty of an offence' within the meaning of Art.7.[71]

The need of a penal conviction to raise an issue under Art.7 has in the early 1970s led the Commission to reject number of applications, which were classified as disciplinary offences or regulatory proceedings. For example, in X v. FRG[72] the Commission said;

> "...the subject of disciplinary proceedings opened against the applicant was not the determination of the applicant's guilt as regards any criminal offence but was in connection with disciplinary offence...the Commission has previously held that the notion of a 'criminal offence' as mentioned in Art.6(2) and (3) of the Convention, does not envisage disciplinary offences...this finding applies equally to the interpretation of these words as mentioned in Art.7(1) of the Convention...Consequently, the guarantees under this Art. are not applicable in the applicant's case."[73]

This line of approach was significantly changed after the Court's decision in the Case of Engel.[74] In this case the Court laid down certain criteria for the determination of whether a particular proceeding is "criminal" or "disciplinary".[75] A proceeding, which falls within those criteria, is regarded as criminal irrespective of the classification placed upon such proceeding by the national legal system. Although the Judgement in the Engel case referred to Art.6, according to Strasbourg jurisprudence, its reasoning must equally apply to Art.7 as well. Thus, all convictions and sanctions, inclusive of those that result from disciplinary or regulatory proceedings, are within the meaning of the phrase "held guilty" for the purpose of Art.7 if their nature and consequences greatly resemble criminal convictions and penalties.

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[68] See, App.No.7512/76, X v. Netherlands, 6 D & R (1976) 184. On the basis of Soering judgment [Ser.A Vol.161 (1989)] some writers, however, argue that extradition to face a real risk of conviction con trary to Art.7 as a potential breach of that Art. See, D.J.Harris, M.O'Boyle, and C.Warbrick, *Law of the European Convention on Human Rights*, (London: Butterworths, 1995), p.275.

[69] See, De Wilde, Ooms and Versyp v. Belgium, Judgment of 18th June 1971, Ser.A Vol.12 (1970) p.44 para.87.

[70] See, App.No.23326/94, Mahaut v. France, 82-B D & R (1995) 31. Also see, App.No.14524/89, Yanasik v. Turkey, 74 D & R (1993) 14 - Expulsion of a student from a military academy following disciplinary proceedings does not constitute a conviction for a criminal offense within the meaning of Art.7.

[71] See, App.No.21915/93, Lukanov v. Bulgaria, 80-A D & R (1995) 108.

[72] App.No.4274/69, 13 YBECHR (1970) 888 p.890.

[73] Also see, App.No.4519/70, X v. Luxembourg, 14 YBECHR (1971) 616; App.No.15965/90, R.H. v. Spain, 74 D & R (1993) 14 - dismissal of a civil servant following disciplinary proceedings does not constitute a conviction for an offense within the meaning of Art.7.

[74] Judgment of 8th June 1976, Ser.A Vol.22 (1977). Also see, supra pp.173-175

[75] Ibid., p.35.

[76] App.No.10038/82, 38 D & R (1984) p.53.

In Harriet Harman v. The United Kingdom[76] the Commission declared the application admissible for consideration under Art.7, albeit it related to civil contempt of court. The fact that in English law civil contempt is not regarded as a criminal offence[77] did not exert much influence on the Commissions deliberations. Notwithstanding its objective, i.e., to enforce court orders and procedures[78], the proceedings brought against civil contempt in English law fell within the Engel criteria as they entailed punitive measures such as fines, imprisonments[79], which were essentially similar to criminal penalties. However, this case ended without a decision as to whether any violation of Art.7 had been occurred since a friendly settlement was reached between the parties.[80]

What Art.7 prohibits is only the retrospective creation of criminal offences but not retrospective legislation in general.81 Thus, application of procedural laws, inclusive of laws relating to detention on remand, bails, appeals, release from prison on probation or parole, legal aid, etc., with retrospective effect is not contrary to the provisions of Art.7. For, such laws do not relate to the determination of guilt in any substantive manner.82 Presumably, however, any retroactive application of changes in law of evidence to the detriment of the accused should bring into question Art.7 since that branch of law is closely connected with the determination of guilt.[83]

The second sentence of Art.7(1) prohibits the imposition upon an offence a penalty heavier than the one that was applicable at the time the offence concerned was committed. In Jamil v. France[84] the Applicant who was convicted of drug smuggling, was sentenced, *inter alia*, to pay a customs fine with imprisonment in default. The appeal court increased the term of imprisonment in default pursuant to a law, which was passed after the offence was committed. The Court unanimously found a breach of Art.7(1). However, it must be noted that a mere threat of a penalty would not be sufficient to invoke the guarantee of Art.7.[85] Also, what the second sentence of Art.7(1) concerned with is the retroactive imposition of heavier penalties, not with the manner of enforcement of penalties already pronounced. [86]

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[77] See, C J Miller, *Contempt of Court*, Second Edition (Oxford: Clarendon Press 1989).

[78] Ibid., p.3.

[79] Ibid., p.4.

[80] See, 46 D & R (1986) 57.

[81] See, A.H.Robertson and J.G.Merrills, *Human Rights in Europe*, 3rd Edition (Manchester: Manchester University Press 1994), p.126.

[82] See, J.E.S.Fawcett, *The Application of the European Convention on Human Rights*, (Oxford: Clarendon Press 1987), pp.202-203.

[83] For example, retroactive application of changes in the rules of evidence that impute the burden of proof upon the prosecution, can be seriously detrimental to the accused.

[84] 21 EHRR (1996) 65.

[85] See, The Greek Case, 12 YBECHR (1969) pp.184-185. Also see, App.No.8734/79, Barthold v. Federal Republic of Germany, 26 D & R (1982) 145 p.155.

[86] See, App.No.11635/85, Hogben v. The UK, 46 D & R (1986) 231.

[87] Judgment of 9th February 1995, Ser.A Vol.307-A (1995).

In Welch v. The United Kingdom[87] the court examined the meaning of the word "penalty" in the second sentence of Art.7(1). After having been found guilty of criminal offences involving drug trafficking, alleged to have been committed prior to 1987, the Applicant in this case had been given a 22-year imprisonment. In addition, pursuant to the Drug Trafficking Offences Act 1986, the trial judge had imposed a confiscation order amounting to £66,914. In default of the payment of this sum the Applicant was to receive a further consecutive two years' sentence. On appeal, the Court of Appeal had reduced the overall sentence by two years and the confiscation order by £7,000.

According to the 1986 Act, which had come into force in January 1987, the amount to be recovered under a confiscation order shall be the amount the Crown Court assesses to be the value of the defendant's proceeds of drug trafficking.[88] Moreover, the Act, *inter alia*, empowered the national courts to assume that any property which the offender currently held or which had been transferred to him in the preceding six years, or any gift which he had made during the same period, to be the proceeds of drug trafficking.[89] In his application the Applicant complained that the confiscation order made against him amounted to an imposition of a retrospective criminal penalty contrary to Art.7. However, he emphasized that his complaint was limited to the retrospective application of the confiscation provisions of the 1986 Act and not about the provisions themselves. According to the Respondent Government, on the other hand, the confiscation order was not intended to be a punishment or a sanction for any specific offence and therefore did not amount to a penalty within the meaning of Art.7. It was a preventive measure designed to prevent a defendant from benefiting from the proceeds of drug trafficking and to prevent the use of proceeds for drug trafficking in the future.

The Commission by seven votes to seven with the casting vote of the Acting President being decisive found no violation of Art.7.[90] However, the Court took a different view. In its opinion, by seeking to confiscate the proceeds, as opposed to the profits, of drug trafficking, irrespective of whether there had in fact been any personal enrichment, the confiscation order had gone beyond the notions of reparation and prevention into the realm of punishment.[91] Also, the Court considered the facts that an order could not have been made unless there had been a criminal conviction and that the degree of culpability of an accused was taken into consideration by the domestic courts in fixing the amount of the order, as indications that pointed in the direction of a penalty.[92] The Court said:

[88] See, Art.4(1) Drug Trafficking Offenses Act 1986, Current Law Statutes Annotated 1986, Vol. I (London: Sweet & Maxwell and Stevens & Sons 1987), c.32-1 at p.32-7.
[89] Ibid., Art.2, pp.32-5.
[90] See, the Opinion of the Commission, Welch Case, Ser.A Vol.307 (1995), Annex, 18 p.23 para.55.
[91] See, ibid., the Judgment of the Court, p.5 at p.11 para.23.
[92] Ibid..

11-2006-06-0782-OUP-500

"(t)he concept of a penalty in this provision is...an autonomous Convention provision...(t)o render the protection offered by Art.7 effective, the court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a 'penalty' within the meaning of this provision...(t)he wording of Art.7(1) second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a 'criminal offence'. Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity."[93]

As the preparatory work on the Convention reveals the object of Art.7(2) is to make it clear that Art.7 does not effect the laws which were passed under very exceptional circumstances at the end of the second world war to suppress war crimes. However, this provision becomes redundant insofar as a conviction or a penalty based upon a retroactive penal law can be justified under Art.7(1) as being for an act or omission which at the time of its commission or omission constituted a crime under international law. On the other hand, unlike Art.7(1) which refers to international law, Art.7(2) refers to "general principles of law recognised by civilised nations".[94] The effect of this difference in phraseology, at least in theory, is that under the exception in Art.7(2) the national authorities are not prohibited from applying with retrospective effect rules of municipal law which are common to civilized countries but which has not yet been recognized or which have not yet crystallized as principles of international law.

In general, Art.7 does not interfere with the right of Member States to decide what acts or omissions should qualify as offences within their respective legal systems. Neither does it question the nature or severity of penalty imposed upon such offences. Strasbourg review under Art.7 is confined only to questions of legality of penal laws and sentences. In Kokkinakis v. Greece the Court recapitulated the general scope of this review;

"...Art.7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty *(nullum crimen, nulla poena sine lege)* and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."[95]

[93] Ibid., p.13 para.27-28. Compare this judgment with the admissibility decision of M v. Italy, App.No.12386/86, 70 D & R (1991) 59.

[94] Note, the reference is to "nations" in general, not limited to the legal systems of the Member States.

[95] Kokkinakis v. Greece, Judgment of 25th May 1993, Ser.A 260-A (1993) at p.22 para.52.

The purview of Art.7 of the European Convention is not limited to restraining the retroactive creation of penal laws or to prohibiting the imposition of a heavier penalty on a criminal offence than the one that was applicable at the time the alleged offences was committed. It also precludes the domestic criminal courts from extending with retrospective effect by way of interpretation the scope of existing criminal laws. In South-Asia, while the Constitutions of India, Sri Lanka and Bangladesh have prohibited the conviction under *ex post facto* laws, the Constitutions of Pakistan and Nepal have made it unlawful to inflict any punishment under such laws.[96] However, in all five countries it is unconstitutional to impose upon an offence a penalty greater than that, which might have been inflicted under the laws in force at the time of the commission of the offence. Moreover, in Pakistan and Bangladesh, it is against the Constitution to inflict a penalty which is different from the one prescribed by the laws in force at the time of the alleged offence.

The European Convention prohibits convictions under ex post facto laws as well as obsolete laws. Also, in order to conform with the requirements of Art.7(1) of the Convention, the laws that create criminal offences, whether statutory or common law, must be clear and unambiguous. They must also be adequately accessible and formulated with sufficient precision to enable the citizens to regulate their conduct. In addition, the interpretation of such laws must always be reasonably foreseeable. However, retrospective application of penal laws is not against the guarantee of Art.7 if such application is favourable to the accused person. In India, Sri Lanka, Pakistan and Bangladesh, it is not unconstitutional to apply with retrospective effect the laws, which mollify the rigour of a penal sanction. Nonetheless, it must be noted that in India, as was held in the case of State of Maharashtra v. Dattatraya Mathur Kothani[97], a subsequent decriminalisation cannot have any affect on the offences which have already been committed, though it may be considered in the imposition of penalties.

The guarantee of Art.7 of the European Convention can be invoked only if a criminal conviction or a heavier penalty, based on a retroactive or an obsolete law, is involved. But both the words "criminal" and "penalty" have their own autonomous Convention meanings. Consequently, all convictions and sanctions, inclusive of those that result from disciplinary or regulatory proceedings, come within the purview of Art.7, if their nature and consequences greatly resemble criminal convictions and penalties. On the other hand in all five South-Asian countries the guarantee against *ex post facto* laws can be availed by only those who have been convicted or punished by a criminal court. However, in Pakistan and Bangladesh, the Constitutional prohibition against *ex post facto* laws cannot be evaded by giving a civil form to a measure that is essentially criminal.

[96] However, albeit Art.12 of the Pakistani Constitution has not used the word "conviction", according to the Supreme Court of Pakistan, both the conviction as well as the punishment under *ex post facto laws* are unconstitutional (see, *supra* 4.1.3). Similarly in Nepal, even though Art.14(1) of the Constitution has not used the word "conviction", the overall design of the Article suggests that it prohibits both the conviction as well as the punishment under *ex post facto laws*.

[97] 1976 Cr.L.J. 1931.

Retroactive application of procedural laws, inclusive of laws relating to detention on remand, bails, appeals, release from prison on probation or parole, legal aid, etc., is not contrary to the provisions of Art.7 of the European Convention. However, application of changes in law of Evidence with retrospective effect to the detriment of an accused person is against the guarantee of Art.7. In contrast, in India and Sri Lanka, any retrospective application of changes in both, the procedural laws as well as the rules relating to law of evidence, is not violative of the Constitutional guarantee against *ex post facto* laws. In Bangladesh any changes in the procedural laws with retrospective effect is not against the guarantee relating to *ex post facto* laws. Although the prohibition against *ex post facto* legislation in Art.12 of the Constitution of Pakistan does not prevent the legislature from making changes in the procedural laws or making changes relating to the jurisdiction and composition of judicial tribunals with retrospective effect, such changes remain valid only insofar as they do not impair the substantial protections afforded to the accused by the laws in force at the time of the alleged offence. Also, in Pakistan amendment of prison regulations relating to remission, which in effect increases the period of imprisonment to a larger term than the period prescribed by such regulation on the date of the commission of the offence, would be repugnant to the guarantee of Art.12.

According to the European Commission, the manner of enforcement of penalties already pronounced does not come within the scope of Art.7. In the case of Hogben v. the UK[98] the Applicant, who was serving a life sentence for the murder of a jeweller in the course of an armed robbery, alleged that a sudden change in the parole policy had effectively increased his sentence from that which was applicable at the time the offence was committed and from that which was imposed at his trial. However the Commission considered the life imprisonment as the 'penalty' for the purpose of Art.7 and said;

> "...it is true that as a result of the change in parole policy the applicant will not become eligible for release on parole until he has served 20 years' imprison ment. Although this may give rise to the result that his imprisonment is effectively harsher than if he had been eligible for release on parole at an earlier stage, such matters relate to the execution of the sentence as opposed to the 'penalty'which remains that of life imprisonment. Accordingly, it cannot be said that the 'penalty' imposed is a heavier one than that imposed by the trial judge."[99]

In contrast, under somewhat similar circumstances, the Supreme Court of Pakistan, in the case of Mehr Khan v. Razia Begum[100], came to a different conclusion. In this case the accused who were found guilty of murder were sentenced to death by the trial court. An amendment made to the Penal Code after the commission of the offence involved, prescribed death or life imprisonment, which meant 25 years imprisonment, for murder. However at the time of the offence transportation for life under the Penal Code meant transportation for 20 years. At the appeal, which took place after the above amendment, instead of death sentence the accused were awarded life imprisonment. But under

[98] App.No.11635/85, 46 D & R (1986) 231.

[99] Ibid., p.236. Also see, App.No.15384/89, G.L. v. Italy, 77-B D & R (1994) 5 - a fine for the abuse of process does not increase the principal penalty since it penalizes the vexatious exercise of the right of appeal and not the offense which is the object of the proceedings.

[100] 1978 SCMR 294.

Art.12 of the Constitution the Supreme Court converted the sentences to transportation for life, i.e., 20 years. Also in Pakistan, a statute which deprives the accused of the discretion given to the court under the law in force at the time of the offence to pass any sentence between the maximum and the minimum sentences by fixing his/her sentence at a definite term, is repugnant to Art.12, even if the term so fixed is less than the maximum prescribed by the law in force at the time of the offence. So is a statute that shortens the time within which execution shall take place after sentence.

The second part of Art.13 (6) of the Sri Lankan Constitution is similar to Art.7(2) of the European Convention. Nevertheless, instead of the phrase "civilized nations" used by the later Article, the former has used the phrase "community of nations". Also, even though having such a provision to fill the gaps in municipal law can be useful, any inconsistent or discriminatory use of it can give rise to serious injustices.

Finally, notwithstanding the differences highlighted earlier, as regards providing protection against retroactive penal laws and punishments, it is neither an exaggeration of the status of the normative contents of the Constitutional provisions of the South-Asian States and their related jurisprudence, nor an under-estimation of the richness of the European jurisprudence, to conclude from the above study that the situation in the South-Asian region does not fall to any unacceptable level below the standards set by the supra-national supervisory organs of the European Convention. This, however, does not mean that the situation in the South-Asian region is, compared with the situation in Europe, completely satisfactory. It must be noted that the five South-Asian states considered in this paper are home to more than 1.189 billion people, more than a sixth of the planet's population, of whom most are illiterate and live in abject poverty. In conditions such as that, Constitutional guarantees and occasionally delivered court judgments alone, no matter how explicit and impressive they may be, are not sufficient to protect the fundamental rights and freedoms of the individuals. Along with such guarantees and judgments there must also exist among those who hold and wield power, a culture of recognizing and respecting the dignity of each and every human being irrespective of his/her social and economic status. In this regard whether the present situation in the South-Asian states considered in this paper meets the situation in the Member States of the European Convention is extremely doubtful. Unless some forms of radical change, for instance supra-national monitoring, are agreed upon to supervise the effective implementation of fundamental rights by the national authorities, such a culture might not evolve at all or take a very long time to evolve. For, as history demonstrates, never or seldom will there spontaneously arise among those who hold and wield power, a willingness to respect the dignity and rights of subjects.