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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

AMICUS CURIAE BRIEF
FOR THE CONSTITUTIONAL COURT
OF GEORGIA

ON THE RETROACTIVITY OF STATUTES OF LIMITATION
AND THE RETROACTIVE PREVENTION
OF THE APPLICATION OF A CONDITIONAL SENTENCE

Adopted by the Venice Commission
at its 78th Plenary Session
(Venice, 13-14 March 2009)

on the basis of comments by

Mr James HAMILTON (Substitute Member, Ireland)
Ms Maria Fernanda PALMA (Member, Portugal)

1. *By message of 12 February 2009, the President of the Constitutional Court of Georgia has sought an amicus curiae brief on the following questions,*

1. *Does the prohibition of retroactivity of criminal laws extend to the statute of limitations for the prosecution of offences?*
2. *For the application of the statute of limitations retroactively, is it relevant that in the described cases, the applicable law was amended prior to extinguishment of the statute of limitations under the previous criminal law, which was in force at the time of the commission of the offence; thus the limitations were not revived, but extended?*
3. *What does the case-law of the European Court of Human Rights state regarding the retroactivity of statutes of limitations of criminal law and regarding conditional punishment?*
4. *does the principle of retroactivity apply only to criminal law or also to criminal procedure?*

2. *The Commission invited Mr Hamilton and Ms Palma to provide comments on this issue (CDL(2009)049 and 048).*

3. *The present amicus curiae brief was adopted by the Commission at its 78th Plenary Session (Venice 13-14 March 2009).*

Facts in the cases before the Court

4. These questions are raised in the context of complaints made by three separate complainants. According to the request by the President of the Constitutional Court, the facts in these cases can be described as follows:

1. The first complainant committed an offence on 5 May 2000. At that time the relevant law was the Criminal Code of Georgia. This provided for a limitation of five years. On 1 June 2000 the Criminal Code of Georgia 1999 came into force, which extended the prescription period to six years with retroactive effect. The accused was indicted on 20 January 2006, outside the five year period but within the six year period. At the time the period was extended the period of prescription had not yet run.
2. The facts in relation to the second complainant are similar. The offence was committed on 10 June 1992. The prescription period then for that offence was 10 years. On 1 June 2000 it was extended to 25 years. The accused was indicted on 15 September 2005, outside the 10 year period but within the 25 year limit.
3. In the third case, the applicable sentence had been changed between the commission of the offence and the date of sentence so as to prevent the imposition of a conditional sentence.

Purpose of prohibition of retrospective application of criminal law

5. The prohibition of the retrospective application of criminal law relates to the principle of the legality of punishment and is as such part of the wider principle of the rule of law. This prohibition is necessary from the viewpoint of legal certainty, which means that an individual can be prosecuted only for actions, which were foreseeable as criminal offences at the time when they were committed. It would not be fair to be sentenced for actions that were not considered criminal offences at the time they were committed.

6. Another argument for the need to prohibit the retroactive application of criminal law is the principle of impartiality and objectivity of the State governed by the rule of law, which means

that the State itself must respect the laws in force and must not change them to obtain a specific result in relation to a previous situation.

The Nature of statutes of limitation

7. Legal scholars are divided on the question whether statutes of limitation should be regarded as substantive in nature or procedural. If they are to be regarded as substantive in nature then clearly the expiration of a period of prescription not only means there is no longer jurisdiction to punish that crime but that its criminality is extinguished at that time.¹

8. On the other hand, if limitation periods are regarded as procedural only, all that the expiry of the period of prescription means is that the crime is no longer prosecutable, not that the act has ceased to be criminal. On this view, prescription periods may be extended even if they have already run.

9. A third school of thought, while holding that prescription periods are procedural, would nevertheless argue that once prescription periods have already expired they may not be revived without infringing the principle of legality. Kok describes this third as the “mixed” approach. Such mixed systems include the Netherlands and Belgium.²

10. It is not decisive that the statutes would be qualified as criminal law or as criminal procedure law in a formal perspective but their functional role within the legal system has to be considered.

Limitation periods as substantive law

11. Those who support the theory that limitation periods are substantive in nature and that they cannot be extended retroactively argue with the principle of impartiality and objectivity of the State, which must not change the rules to obtain a result affecting situations already consolidated, thereby making the defendant’s position worse. This could even lead to the creation of conditions for a political manipulation of criminal procedure.

12. In this logic, while there is there no guarantee or a right to certain limitations for the defendant, according to the rule of law, the legislative power is obliged to respect the law it enacted and cannot legislate on criminal matters in order to retroactively worsen the legal situation of the defendant compared to what would have been the result under the previous law.

¹ This view is summarized by Kok as follows: “Some scholars consider a statute of limitations as an exculpatory defence (*Strafaufhebungsgrund*), which belongs to substantive criminal law. In their view, expiration of a prescription period not only removes the punishability of the crime and the right to institute criminal proceedings, but also eliminates the unlawfulness of the crime *ex nunc*. Moreover, they usually consider it dubious whether, with the passage of time, the purposes and objectives of punishment, such as retribution, deterrence, rehabilitation, and prevention can still be reached. Consequently, when the prescription period has expired, punishment of the alleged perpetrator of a crime is no longer needed. It is believed that the passage of time removes the wrongfulness of the crime. For that reason, statutes of limitation qualify as substantive criminal law, and retroactive application therefore violates the principle of legality. This being the case, the retroactive amendment of statutes of limitation to the detriment of the offender also is forbidden with respect to prescription periods that have not yet expired.” (Ruth A. Kok, *Statutory Limitations in International Law*, T.M.C. Asser Press, the Hague, 2007, especially Chapter VII, *Imprescriptibility and Retroactivity*, for a very full description of the subject.)

² Kok, *op cit*, pp 298-9.

13. Another argument in favour of the applicability of the legality principle, although not being the most important is that the application of the new statutes of limitation would imply a retroactive application of a legal provision that must be regarded as “criminal law” - at least in a functional (material) sense - because the possibility to incur a penalty or not is analogous to a criminal offence.

14. Consequently, new statutes of limitation should not be applied on the grounds of the principles of impartiality, objectivity and trust belonging to the rule of law which is the basis of the legality principle.

Limitation periods as procedural norms

15. Proponents of the view that limitation periods are procedural in nature argue from the principle that the reasoning behind the rule against non-retroactive penal statutes is that a person who is contemplating an act ought to be able to know at the time of its commission whether that act is unlawful. The logic of this does not extend to limitation periods. A person committing a criminal act cannot know whether they will be apprehended and prosecuted within the period of prescription. Furthermore, the purpose of statutes of limitation is not to confer a benefit on the wrongdoer, but is rather a recognition of the increasing impracticality of having fair trials after memories fade, evidence is lost, witnesses die or become infirm. The Law Reform Commission in Ireland expressed these ideas in the following terms:

“4.54 It is reasonable to suppose that, when a person is committing an act, which may be an infringement of the civil or the criminal law, they will have in mind the substantive law and may adapt their behaviour accordingly. A person who so adapts their conduct to avoid infringing existing legislation, would have a ground for complaint, if there was a subsequent retrospective change in the law. The position is different, however, where the question is one of procedure. The alleged perpetrator of an infringement of the civil or the criminal law, is unlikely to have in mind procedures which would govern a claim or action against him. Such a defendant could not therefore allege that he conducted himself in reliance upon the existing law of limitations or that he had an expectation that his conduct would be governed by that law.

4.55 Furthermore, the manner in which the law of limitations operates does not relate to the conduct of the perpetrator. Limitations relate to delay by the plaintiff, and neither the defendant’s knowledge of the existence of limitations periods, nor any aspect of his conduct, could have any bearing upon such delay or its consequences, since this is not something within the control of the defendant.

4.56 A final point in this regard is that the law of limitations aims to protect a variety of interests. It has the aims of achieving certainty, finality and of respecting the public interest as well as the aim of protecting the defendant against stale claims. This is a further reason why it would be inappropriate to categorise a limitation period as a right of the defendant.”³

³ Consultation Paper on the Law of Limitation of Actions arising from Non-Sexual Abuse of Children (LRC-CP16-2000), Law Reform Commission, August 2000. The views were expressed in the civil law context. Irish law, like most common law jurisdictions, does not have criminal limitation periods except for minor offences.

National Case-Law

16. In Hungary, the Constitutional Court struck down a law which would have suspended prescription periods in relation to crimes committed during the Communist period on the grounds that retroactive abolition of limitation periods infringed the principle of legality guaranteed in the Hungarian Constitution. The Court found two exceptions to this principle: a) if Hungarian law in force at the time when the crime was committed provided no statute of limitations, b) if the crime is a crime against humanity or a war crime, and the non-application of a statute of limitations is an obligation undertaken by Hungary in an international agreement (Decision 53/1993 of 13.10.1993, CODICES HUN-1993-3-015, CODICES HUN-1993-2-012, Decision 11/1992 of 5.3.1992, CODICES HUN-1992-S-001).

17. In respect of a law which provided that the limitation period was suspended for politically inspired crimes that were shielded from prosecution "due to political reasons incompatible with the basic principles of the legal order of a democratic state" during the former Communist regime, the Constitutional Court of the Czech Republic decided that this provision was not constitutive but only declaratory because clarified the fact that the limitation period was suspended. For crimes during the communist regime the limitation period had been a fiction because there had been no genuine will and effort to prosecute and consequently the limitation period could not run (Decision Pl. US 19/93 of 21.12.1993, CODICES CZE-1993-S-001, Decision 41/1993 of 30.6.1993).

Case-Law of the European Court of Human Rights

18. The question of the compatibility of the retroactive extension of prescription periods came before the European Court of Human Rights in *Coëme and others v Belgium*⁴. The applicant argued that a law which had extended a limitation period from three to five years at a time when the three year period had not yet expired was an infringement of, *inter alia*, Article 7 of the Convention.

19. The Court found that “[S]ince the term ‘penalty’ is autonomous in scope, to render the protection afforded by Article 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. (§ 145).

20. The Court described the purpose of limitation periods as follows: “*limitation periods, which are a common feature of the domestic legal systems of the contracting states, serve several purposes, which include ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time.*” (§ 146)

21. The Court noted that the Belgian solution to the problem (which had upheld the legality of the retroactive change) was based on Belgian case-law to the effect that rules of limitation were matters of jurisdiction and procedure. It dismissed the application because: “*The Court notes that the applicants, who could not have been unaware that the conduct they were accused of might make them liable to prosecution, were convicted of offences in respect of which prosecution never became subject to limitation. The acts concerned constituted criminal offences at the time when they were committed and the penalties imposed were not heavier*

⁴ ECHR, *Coëme and others v Belgium*, 18 October 2000, Application Number 32492/96 ; 32547/96 ; 32548/96 ; 33209/96 ; 33210/96, Reports of Judgments and Decisions 2000-VII. Related is also the Case of *Korbely v. Hungary* (ECHR Application Number 9174/02) There, the matter was however whether the applicant was guilty of a crime against humanity for which no statute of limitations applied.

than those applicable at the material time. Nor did the applicants suffer ... greater detriment than they would have faced at the time when the offences were committed" (§150)

22. The Court thus stated clearly that the retroactive application of a legal provision concerning the limitation of criminal responsibility is not a violation of Article 7 per se. However, it may be noted from the foregoing that the court did not express any view on what the law would have been if the limitation period had already expired when it was extended, nor did it need to do so for the purpose of deciding the case.

Retroactive prevention of application of a conditional sentence

23. The third applicant's case raises a somewhat different problem. Here, the law relating to the applicable sentence had been amended between the commission of the offence and the date of sentence so as to prevent the possibility of a conditional sentence.

24. The issue is whether there is a guarantee for the defendant regarding the conditions sentencing according to previously established statutes. Contrary to the case of the retroactivity of the statute of limitation, there is no doubt that this case belongs to the field of substantive law.

25. The principles of the impartiality of the State mentioned above and the argument of the functional characterization of criminal law lead to the prohibition of retroactivity of a provision excluding conditional punishment. The application of the more favourable provision is justified by the principles of equality and of the necessity of punishment.

Conclusions

26. The questions asked by the Constitutional Court of Georgia can therefore be answered the as follows:

27. Questions 1 and 2: The case-law of the European Court of Human Rights establishes that it is permissible, if the domestic law of the state regards a limitation law as procedural rather than substantive, to amend a limitation law so as to extend the limitation period with retroactive effect with regard to crimes where the limitation period has not expired at the time of the amendment. The European Court of Human Rights has not decided whether a retroactive extension is permissible in the case of crimes where the prescription period has already run but it is unnecessary to decide this issue in the context of the actual applications the subject matter of the request. This does not, of course, preclude a state from having a domestic law according to which the expiry of limitation periods gives rise to substantive rather than procedural rights, in which case an extension of the limitation period with retroactive effect may not be permitted. This seems to have been the case with the Criminal Code of Georgia, which provided for the prohibition of retroactivity in wider terms, including all rules detrimental to the offender. This provision was changed in 2000 to cover only criminal rules, which establish or aggravate the punishment of an act.⁵

⁵ Article 3 of the Criminal Code of Georgia until May 2000:

"Article 3. Retroactivity of Criminal Law

1. Criminal law which revokes criminality of an act or commutes punishment or is otherwise favorable to the offender shall be retroactive. Criminal law, which establishes criminality of an act or aggravates punishment, or is otherwise detrimental to the offender, shall not be retroactive."

Article 3, since May 2000:

"1. Criminal law, which revokes criminality of an act or commutes punishment, shall be retroactive. Criminal law, which establishes criminality of an act or aggravates punishment, shall not be retroactive."

28. Question 3: A change in sentencing law which provides for a more harsh regime cannot be applied retroactively but only prospectively. Notwithstanding the change in the law the sentencing court should have had the option to apply a conditional sentence if they considered that was the proper course and if that course was more favourable to the convicted person than the course in fact adopted.

29. Question 4: The principle of retroactivity does not apply to procedural as distinct from substantive criminal law. However, the qualification of a provision as substantive or procedural has to be made from a functional perspective. Where a limitation period has already run it is possible that the principle of legality could be invoked to prevent its revival.