



Strasbourg, 4 March 2009

CDL(2009)048*

Opinion No. 523/2009

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE RETROACTIVITY OF STATUTES OF LIMITATIONS
IN GEORGIA**

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1. The Constitutional Court of Georgia has sought an *amicus curiae* opinion on the following questions,
 1. Does the prohibition of retroactivity of criminal laws extend to the statute of limitations for the persecution 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 commission of offence; thus the limitations were not revived, but extended?
 3. What does the EctHR case-law states regarding the retroactivity of statutes of limitations of criminal law and regarding conditional punishment?
 4. Principle of retroactivity applies only to criminal law or also to criminal procedures?
2. These questions are raised in the context of complaints made by three separate complainants. The factual situations are as follows:-
 - (1) The first complainant (N428) 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. Under it the prescription period was extended 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 (N459) 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) The facts relating to the third complainant raise different issues which I will deal with separately.

THE LAW

3. 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. 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. 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.¹

4. The argument advanced by those who support the theory that limitation periods are substantive in nature 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.”²

5. 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 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

¹ See 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, para 371

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

6. 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 ECHR.

7. The Court describes the purpose of limitation periods as follows:

§146

"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."⁵

8. The Court noted that the Belgian solution to the problem (which had upheld the legality of the retroactive change) was based on Belgian caselaw 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 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"⁶

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.

⁴ ECHR, *Coëme and others v Belgium*, 18 October 2000, Applications Nos 32492/96, 32547/96 and 32548/96

⁵ *Ibid*, §146

⁶ *Ibid*, §150

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.

9. It may be noted that in Europe there are examples of states which adopt the “mixed” system whereby limitation periods may be extended only if they have not already expired as well as states which regard the issue as purely procedural.⁷ There are also states which take a substantive approach, such as Hungary, where 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.⁸
10. The third applicant’s case raises a somewhat different problem. In this case the law relating to 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. 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.
11. I would therefore answer the four questions asked as follows:
 - 1&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.
 3. See paragraph 10 above.
 4. The principle of retroactivity does not apply to procedural as distinct from substantive criminal law. But where a limitation period has already run it is possible that the principle of legality could be invoked to prevent its revival.

⁷ Kok, *op cit*, pp 298-9. “Mixed” systems include the Netherlands and Belgium

⁸ Kok, *op cit*, pp 300-301