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(VENICE COMMISSION)

COMMENTS

ON THE RETROACTIVITY OF STATUTES OF LIMITATIONS IN GEORGIA

by

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1-The prohibition of retrospectiveness of statutes concerning criminal offences, penalties or charges in criminal responsibility is an essential implication of the legality principle and therefore an expression of the rule of law. The prohibition of retrospectiveness is supported on the grounds of democratic security, which means that as free citizens we have the right to be persecuted only if our actions were foreseeable as criminal offences and if our liability to a corresponding penalty was also foreseen by the law; on the grounds of the principle of personal responsibility in the sense that it is not fair to be sentenced for incidents that were not considered criminal offences or conceived as punishable at the time they were committed; and lastly, on the grounds of the principle of impartiality and objectivity of the State governed by the rule of law – which means that the State must respect the laws entered in force and must not change them to obtain a specific regulation for a particular or a recognized previous situation. Considering these grounds, the legality principle must be invoked in the case of the statutes of limitations of the criminal procedure?

My answer is affirmative, either when new statutes restore a criminal liability previously extinguished (when an expectation not to be persecuted by criminal law was acquired) or when there is an non-authentic retroactivity and the new statutes only extend the statute of limitation of the responsibility.

The reason in the latter case is the idea 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 and creating conditions for political manipulation of criminal procedure. We cannot say that there is a guarantee or a right to certain limitations for the defendant, but we can say that the legislative power under the rule of law is obliged to respect the law it enacts and cannot legislate on criminal matters merely to avoid, to the detriment of the defendant's situation, what would have been the result under the previous law.

Another argument in favor of the applicability of the legality principle, although not being the most important ,considers 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 it interferes with the possibility or non possibility to be condemned to a penalty and therefore is analog to a consequence of the criminal offence.

In fact, for example, the Portuguese Constitutional Court has several decisions concerning the statute of limitation on the matter of the suspension of its legal course having always decided that such legal provisions are subject to the legality principle, as foreseen on numbers 1 and 3 of article 29.º of the Portuguese Constitution. The matters were not about a retroactive application, the issue being about an extensive interpretation of the suspension's legal provision, the Court has decided that: "It would be rather awkward that the whole criminal legal system being bound by the protective legality principle only the statute of limitation suspension legal provisions would be exempted from the same protectiveness (...)." (Constitutional Court's Decision n. 183/2008 http://w3.tribunalconstitucional.pt/acordaos/acordaos08/101-200/18308.htm. See also Les Cahiers du Conseil Constitutionnel, n.º 10, 2001, Dalloz, Paris, pp. 46 a 50).

The position of the majority of doctrine in several European countries is that they agree about the prohibition of restrospectivness in the case of a revivifying of responsibility, but not about the prohibition of extension of limitations when they enter in force before the period of the former statutes elapses. However, several authors from different European countries have supported the referred prohibition in a way that doesn't exclude even when there is a mere extension. Authors such as, for example, Donini (following Bricola's tradition) in Italy, Jakobs and Stratenwerth in Germany and Switzerland, Palma in Portugal among others(see, Donini,Prescrizione e irretroactività fra Diritto e Procedura Penale, Foro Italiano, 1998, V,

326 ;Jakobs, Strafrecht, Allgemeiner Teil, 2nd ed,1993,67 and 95; Stratenwerth/Kuhlen, Strafrecht, Allgemeiner Teil,5th ed ,2004,119; Palma,Direito Penal,Parte Geral,1994,111).

When we take into appreciation the present case, we see that not only there was an extension of the period of limitations in the statutes but also a revision of the general rules about the sphere of action of the prohibition of restrospectiveness in the Penal Code. Notwithstanding this change being a restriction towards the prohibition of restrospectivness, this does not mean that the rule of the Penal Code could itself be retrospective without affronting the legality principle, the prohibition of restrospectiveness and the prohibition of impartiality as constitutional principles.

In conclusion, my opinion is that the 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 that is the basis of the legality principle.

2- Another question is if there is a prohibition of retroactivity with regard to the changes in the statues of conditional punishment.

In this case we face the problem of knowing if there is a guarantee for the defendant regarding the conditions of penalty execution previously established by statutes. As a matter of fact, we can say that this sort of guarantee does not belong to the ground of the legality principle as security of expectations at the time when the crime was committed, unless the defendant has already reached the stage of taking advantage of the application of the previous rule (if the conditional punishment was already applied in the court decision or if all the requirements where fulfilled in the moment in which the new law came into force).

However we still have to consider the possibility of partiality when criminal law was changed to obtain an effect of degrading a defendant's concrete situation due to its application to existent cases already ruled by a more generous law. Also the modification of the statutes about conditional punishment could interfere with the expectations about the defendant's plan of life at the time of the sentence. This could justify that a change concerning the execution of the penalty could put in question the legitimacy of expectations against the State, in view of the condemned person's return to free society. Therefore the retroactivity should be forbidden at least beyond the moment in which the court makes a decision on the punishment.

Notwithstanding, the argument of the impartiality of the State, that was invoked in the first point , and also the argument of the functional characterization of the criminal law would also lead to the prohibition of retroactivity of the most severe conditional punishment.

A possible argument against the argument of the impartiality is that when the law is in favor of the defendant, we could also argue that there is a partiality problem, but the correct answer is that the retroactivity of the more favorable provisions is justified by the principles of equality and of the punishment's necessity.

3- A third question is the necessity of including the criminal procedure law in the sphere of the prohibition of retroactivity.

This old problem must be answered differentiating the rules that only belong to procedure as an organization of the State and court activity to obtain the evidence and to discuss the responsibility of the defendant and the rules that can interfere with the procedural rights of the defendant, such as the right of appeal or the right to be heard in certain acts. In the first case,the criminal procedure law is to be immediately applied responding to the new perspectives of organizing the process, always preserving the stability and validity of the previous acts. In the second case, when the new law interferes negatively with the rights of the defendant, which could still be preserved, then non-retroactivity must be hold. For these

reasons, it is not decisive that the statutes would be formaly qualified as criminal law or as criminal procedure law in a formal(legal) perspective without considering their functional role within the legal system.

4. The last point is about the relevant jurisprudence of the European Court of Human Rights in these matters.

I have found some decisions about the statutes of limitations, the most significant being the decision on the Case of ***Coëme and Others v. Belgium***, although the matter is also slightly mentioned on the Case of ***Korbely v. Hungary***. On the issue of the conditional imprisonment I found of particular relevancy the Cases of ***Kafkaris v. Cyprus*** and ***Welch v. United Kingdom***. The European Court case-law on this matter is that theArticle 7 requires that at the time when the offense was committed there was in force a legal provision which made that particular offense punishable, and that the punishment imposed henceforth does not exceed the limits fixed by the initial provision (***Coëme and Others v. Belgium/ Korbely v. Hungary***, amongst others).

Since the term "penalty" is autonomous in scope, the Court regards that an effective assessment of the precise measure that is to be applied must take place, and this goes beyond the mere formal perspective of a "penalty". (***Coëme and Others v. Belgium/Welch v. United Kingdom/Kafkaris v. Cyprus***, amongst others***)***. To form a clear concept of "penalty", the Court's starting-point for the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence", excluding from this conception provisions concerning the remission of a sentence or a change in a regime for early release but including the definition by an autonomous provision of the terms of a legal provision that stated "life imprisonment" as a penalty (***Kafkaris v. Cyprus***).

Hence, it is not possible to predict which would be the Court's assessment on this matter. However, the Court tends to regard as "penalty" all the negative consequences of the conviction that are determined on the conviction sentence itself (***Welch v. United Kingdom***), therefore excluding from the notion of "penalty" the provisions concerning a mere execution or enforcement of the conviction. It is possible though not certain to anticipate that a provision regarding the type of "penalty" – conditional or effective – would be considered a "penalty" within the meaning of Article 7.

As to the issue of the statute of limitations, the Court stated clearly that the immediate application of a legal provision concerning criminal responsibility limitations is not a break of Article 7 *per se*, having rendered the prospect of such a break occurring if the legal provision were to restore the possibility of punishing offenders for acts which were no longer punishable because they had already become subject to limitation (***Coëme and Others v. Belgium***).