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PROBLEM OF NON-RETROACTIVITY IN SUBSTANTIVE CRIMINAL LAW

(ANALYSIS OF THE COURT PRACTICE)

ABSTRACT

Criminal law protects, on the one hand, individual and general good from criminal infringement, and on the other hand, the rights and freedoms of accused and convicted persons, through the retroactivity of criminal law, the analogy of law, the prohibition of double punishment, and other guarantee conditions, that act in their favour. All of the above are considered to be the demonstration of general legal principles (principles of justice, legality, and humanity) in legal science.

The principle of legality, together with the principles of justice and humanity, is an essential element of the principle of legal state and is directly related to substantive criminal law. According to national or international provisions, if an act is not considered an offence at the time of its commission either under national or international law, criminal liability shall not be imposed on a person. Therefore, according to that provision, the national legislator may not adopt provisions that retroactively impose or toughen liability.

In addition to the legislator, judges shall not have the right either, when imposing liability, to retroactively apply a legal provision if it worsens a person's condition. Checking whether a certain act violates national or international law or not, is the objective and subject of discussion by domestic judicial authorities.

This article analyses whether that important principle of legality is properly exercised in the judgments made by domestic courts. This paper focuses on the problem of the application of the retroactivity of law in terms of both, a limitation period and a conditional sentence, and the issue of liability of a person if the conditional sentence is changed or mitigated. This article also analyses practical examples of the application of the principle of non-retroactivity in relation to blanket provisions. All the above-mentioned problems are analysed based on the judgments delivered by the Constitutional Court of Georgia, after which the author provides the interpretation of Article 3 of the Criminal Code of Georgia in accordance with the Constitution of Georgia.

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I. INTRODUCTION

Criminal law protects, on the one hand, individual and general good from criminal infringement, and on the other hand, the rights and freedoms of accused and convicted persons, through the retroactivity of criminal law, the analogy of law, the prohibition of double punishment, and other guarantee conditions, that act in their favour. All of the above are considered to be the demonstration of general legal principles (principles of justice, legality, and humanity) in legal science.[1]

The principle of legality, together with the principles of justice and humanity, is an essential element of the principle of legal state and is directly related to substantive criminal law.[2] Both, Article 31(9) of the Constitution of Georgia and Article 3 of the Criminal Code of Georgia, and Article 7 of the European Convention on Human Rights, clearly state that if an act is not considered an offence at the time of its commission either under national or international law, criminal liability shall not be imposed on a person. Therefore, according to that provision of the Constitution, the criminal law, and the European Convention, the national legislator may not adopt provisions that retroactively impose or toughen liability.

In addition to the legislator, judges shall not have the right either, when imposing liability, to retroactively apply a legal provision if it worsens a person's condition. Therefore, criminal law is not always retroactive, but only when it completely annuls criminal liability for an act or mitigates punishment. Checking whether a certain act violates national or international law or not, is the objective and subject of discussion by domestic judicial authorities.[3]

This article analyses whether that important principle of legality is properly exercised in the judgments delivered by domestic courts. The above-mentioned problem will also be analysed based on the judgments delivered by the Constitutional Court of Georgia, after which Article 3 of the Criminal Code of Georgia will be interpreted in accordance with the Constitution of Georgia.

[1] Cf. Tinatin Tsereteli, "Application of Criminal Law in Time" (1967), p. 2, Soviet Law 16; Otar Gamkrelidze, The Interpretation of the Criminal Code of Georgia (2008), pp. 54-61; Merab Turava, Criminal Law, Overview of the General Part (the Ninth Edition, 2013), p. 24; Levan Kharanauli, "The Guarantee Function of Criminal Law" (2008), p. 1, Justice and Law 51.

[2] Cf. Merab Turava, "The Right to a Fair Trial" in Irakli Burduli, et al., Comment on the Constitution of Georgia, Chapter Two, Georgian Citizenship, Basic Human Rights and Freedoms (2013), p. 555.

[3] Judgment of the European Court of Human Rights in Case No 36376/04 Kononov v. Latvia, 17 May 2010, para 187.

II. PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA IN RELATION TO THE PRINCIPLE OF NON-RETROACTIVITY

The practice of the Constitutional Court of Georgia is quite broad in terms of the non-retroactivity of law. Inter alia, a judgment of 13 May 2009 is interesting and noteworthy,[4] which is related to the different aspects of the non-retroactivity of law to the detriment of a person. In particular, the main subject in the said judgment was the application of the retroactivity of criminal law with regard to a limitation period. Although the Constitutional Court did not declare the appealed provision of Article 3(1) of the Criminal Code of Georgia as unconstitutional, it interpreted the latter in accordance with the Constitution. In particular, the Court made important interpretations in terms of the application of retroactivity of law to a limitation period and a conditional sentence.

More specifically, the Constitutional Court declared the extension of the limitation period and the application of the retroactivity of law to it after the expiration of the limitation period determined for the criminal prosecution for an act committed in the past, as an indirect establishment of the criminality of the act.[5] But if a limitation period was extended before the expiration of the initial limitation period, it declared the application of the retroactivity of law to such aggravation of the situation as admissible, and did not consider it a violation of the Constitution.[6]

In the above judgment, the Constitutional Court made an interesting interpretation regarding another important legal institution, a conditional sentence.

According to the judgment of the Court, non-retroactivity of law applies not only to the provisions of the Special Part of criminal law but also to the provisions of the General Part of criminal law, including a conditional sentence.[7] The Court held that lifting a conditional sentence was the toughening of the punishment and a form of serving a sentence. In particular, according to the Court's interpretation, "the opinion that disputed provisions related to the principle of non-retroactivity cannot be applied to the relations regulated by the General Part of criminal law and, therefore, the aforementioned guarantees shall not be applied to a conditional sentence, must

[4] Judgment of the Constitutional Court of Georgia in Case No 1/1/428,477,459 the Public Defender of Georgia, a citizen of Georgia Elguja Sabauri and a citizen of Russian Federation Zviad Mania v. the Parliament of Georgia, 13 May 2019. See dissenting opinions on the above judgment: dissenting opinions of Ketevan Eremadze, Konstantine Vardzelashvili, and Vakhtang Gvaramia. See also the critical analysis of the judgment in Davit Sulakvelidze's academic article: Davit Sulakvelidze, "On the Retroactivity of Criminal Law – Comment on the Judgment of the Constitutional Court of Georgia" (2010), p. 2, the Constitutional Court Review, pp. 144-157.

[5] Cf. Merab Turava, "Criminal Law, Doctrine of Crime" (2011), pp. 107-123; Pridon Diasamidze, "Problematic Issues of the Application of Retroactivity of Law by Courts" (2021), p. 16, Law and World, pp. 79-83.

[6] Cf. Turava, supra note 2, 560.

[7] ibid.

be considered incorrect".[8] According to the Court's interpretation, "the guarantee of non-retroactivity is a guarantee provided for the entire criminal law, as an organic combination of provisions, and not just for one of its parts. When the retroactivity of law is the case, it includes the entire body of provisions of criminal law".[9]

Thus, according to the above interpretation of the Constitutional Court, the court tried to change an incorrect practice of the common courts of Georgia at that time, under which the guarantee of non-retroactivity of law applied only to the provisions of Special Part of the Criminal Code of Georgia.[10] However, whether or not that provision of the Constitutional Court was reflected in the subsequent judgments made by the domestic courts, will be discussed below.

It is worth noting that the Constitutional Court discussed the issue of non-retroactivity of law in other judgments as well.[11] In terms of a doctrine, all cases are interesting. Although, a judgment of 20 September 2019 can be emphasised in this regard.[12] It is related to the issue of the constitutionality of the law of 4 July 2007. More specifically, the law amended the Criminal Code of Georgia and, among other things, the concept of a repeated crime was formulated differently,[13] according to which the repeated crime

[8] See. supra note 4, para 33.

[9] ibid.

[10] Cf. Turava, supra note 2, 560.

[11] For example, see the judgment of the Constitutional Court of Georgia in Case No 1/4/557,571,576 "Citizens of Georgia Valerian Gelbakhiani, Mamuka Nikolaishvili, and Aleksandre Silagadze, v. the Parliament of Georgia", 13 November 2014, in which the Constitutional Court provided the following interpretation: The second sentence of Article 42(5) of the Constitution of Georgia determines the constitutional grounds for the retroactive application of law mitigating and annulling the liability. Although it is not as absolutely and unconditionally binding for the State as the non-retroactivity of law establishing or aggravating the liability envisaged by the same provision, it additionally limits the scope of the free discretion of the State by the principle of not interfering with the freedom of a person when it is not/no longer necessary and more strictly than it is objectively necessary for the protection of certain legitimate goals. See also Judgment of the Constitutional Court of Georgia in Case No 3/1/633,634 "the constitutional submission of the Supreme Court of Georgia on the constitutionality of Article 260(5)(c) of the Criminal Procedure Code of Georgia" and "the constitutional submission of the Supreme Court of Georgia on the constitutionality of Article 306(4) and Article 269(5)(c) of the Criminal Procedure Code of Georgia", 13 April 2016. In the above judgment, the Court stated: putting a person on trial, passing a judgment of conviction, and imposing a sentence, based on a repealed law, by itself constitutes the imposition of liability on a person based on the law applicable at the moment of commission of an act. According to the position of the Constitutional Court, this conclusion cannot be changed by the fact that, based on a new law decriminalising the respective act, the person is released from the imposed punishment. Finding a person guilty and at fault, which implies blaming the person for the committed unlawful act, constitutes the limitation of the person's interests by the State in response to the committed offence and, therefore, should be considered as "liability" under Article 42(5) of the Constitution of Georgia. The analysis of this judgment is provided in: Maia Kopaleishvili, "The Practice of Legal Proceedings of the Constitutional Court of Georgia in the Area of Criminal Law" in Maia Ivanidze (Editor), Nona Todua 60 (Anniversary Collection, 2021), p. 69.

[12] Cf. Judgment of the Constitutional Court of Georgia in Case No 2/4/1365, 20 September 2019.

[13] Article 15, the Law of Georgia Criminal Code of Georgia <https://matsne.gov.ge/ka/document/

was defined as the commission by a previously convicted person of the crime provided for by the same article of the Criminal Code, while the similar provision determined by the previous version of the Criminal Code did not include an element of "conviction" in the concept of the repeated crime, with such formulation.

Article 2 of the disputed law regulated the issue of application in time of the above-mentioned provision and established that the said regulation should not have been applied to acts committed before the entry into force of that law.[14]

That provision of the law became the subject of dispute at the Constitutional Court. A claimant stated that, as a result of the amendments made to the Criminal Code on 4 July 2007, a necessary condition for qualifying an act as a repeated crime was the commission by a previously convicted person of the crime provided for by the same article.[15] The incorporation of the element of conviction in the concept of a repeated crime reduced the circle of persons, whose acts might be qualified as a repeated crime. If the crime committed by the claimant[16] was to be evaluated taking into consideration the amendments made to the Criminal Code on 4 July 2007, the claimant's act could not be qualified as a repeated crime, as the claimant had not been previously convicted of the same act. That would result in the imposition of a relatively mitigated punishment on the claimant.

The Constitutional Court analysed in detail the content of both the current version of Article 15 of the Criminal Code (repeated crime) and its older version before the amendments were made, and concluded that the right to retroactive application, which is guaranteed by the second sentence of Article 31(9) of the Constitution of Georgia, applies to all legislative acts that result in the mitigation of or release from punishment and the adoption of which is "conditioned by the humanism of the society or the absence of necessity of the measure of punishment applicable before the amendments".[17]

According to the interpretation of the Constitutional Court, the constitutional right of retroactive application of the law mitigating or annulling the liability applies to the cases where, based on the decision of the legislator, a measure of punishment established for a certain crime has been mitigated or annulled.[18] "The purpose of the above constitutional right is to apply to an act committed by a person the legislative amendment mitigating the liability that is conditioned by more tolerant attitude of the society towards a certain

view/16426?publication=241> [last accessed on 15 March 2022].

[14] See supra note 12.

[15] ibid.

[16] The claimant had been convicted of intentional murder twice before the entry into force of the disputed law and, in addition, both episodes of intentional murder were qualified as an intentional murder committed repeatedly, based on a single judgment.

[17] See supra note 12.

[18] ibid.

act, or the absence of the necessity to punish people within the framework of the strict punishment applicable before the amendments".[19] The Court also states that "the aim of the right of retroactive application of the law mitigating or annulling the liability is to enable people to fully benefit from the positive results of the development of the society and law, as well as progressive and humane thinking, that are reflected in the criminal law policy and certain measures of liability".[20]

Based on the above, the Court considered that the disputed provision had illegitimately limited the retroactive application of the amended version of Article 15(1) of the Criminal Code of Georgia to the acts committed before the entry into force of the disputed law. Therefore, the Constitutional Court declared as unconstitutional the provision of Article 2 of the Law of Georgia of 4 July 2007 (repeated crime means the commission by a previously convicted person of the crime provided for by the same article of the Criminal Code of Georgia), according to which the said regulation was not applied to the acts committed before the entry into force of the law.

Thus, the practice of legal proceedings of the Constitutional Court of Georgia in relation to the problem of non-retroactivity of law is quite broad and interesting. The importance and the purpose of the principle of non-retroactivity are unequivocally recognised in a number of judgments of the Court. In particular, the main purpose of the said principle is that the legislator does not decide to severely punish persons for previous acts in the conditions where the amended legislation provides for a relatively mitigated measure of liability for the same acts in the future. The constitutional right of retroactive application of the law mitigating or annulling the liability applies to the cases where, based on the decision of the legislator, a measure of punishment established for a certain crime has been mitigated or annulled.[21] Restriction of the right, in order to violate the fundamental good protected by the same right, contradicts, according to the Constitutional Court, the concept of the right itself and, therefore, is not inherent to the constitutional legal order.[22]

[19] ibid.
[20] Cf. see supra note 11; see also supra note 12.
[21] Cf. supra note 12.
[22] ibid.

III. OVERVIEW OF THE PRACTICE OF COMMON COURTS IN RELATION TO THE PRINCIPLE OF NON-RETROACTIVITY

1. INTERPRETATION OF THE SUPREME COURT OF GEORGIA IN RELATION TO A LIMITATION PERIOD

After the judgment of the Constitutional Court of Georgia of 13 May 2009,[23] the Supreme Court of Georgia soon delivered an interesting judgment regarding a similar problem, in particular, a judgment of 28 May 2009.[24] According to the case file, two persons, who were blamed for the commission of a crime, were convicted of the neglect of duty, a crime under Article 342(2) of the Criminal Code of Georgia.

In this case, the main argument of the defence regarding a reason why the convicted persons should have been released from serving the sentence was that, under Article 71(1)(a) of the Criminal Code of Georgia[25], the limitation period for a crime which the convicted persons were accused of was two years at the time of the commission of the crime (before 1 January 2004)[26], which should have expired by the time the charges were brought against them (12 September 2006). Therefore, according to the argument of the defence, even if the convicted persons have committed a crime, they should have been released from serving the sentence due to the expiration of the limitation period determined for that crime.

The Supreme Court granted that part of the cassation appeal of the defence. In particular, the Supreme Court upheld the arguments of the defence in relation to a limitation period, by which it practically took into consideration the justification for the limitation period provided in the judgment of 13 May 2009 of the Constitutional Court of Georgia.

Namely, the Chamber of Cassation stated that sub-paragraph (c1) was added to Article 71(1) of the Criminal Code of Georgia on 25 July 2006,[27] and therefore, the two-year limitation period established by the same article for the actions committed by the above-mentioned convicted persons have been expired before the entry into force of those amendments. Therefore, the above legislative amendments could not have been retroactive in relation to the actions committed by the convicted persons.[28] As a result, the Court found the convicted persons guilty of the charges brought against them, although released them from serving the sentence due to the expiration of the limitation period for the criminal prosecution for the act committed by them.[29]

[23] See supra note 4.
[24] Judgment of the Constitutional Court of Georgia in Case No 2ვ-99ბ3-09, 28 May 2009.
[25] Releasing from criminal liability due to the expiration of the limitation period.
[26] Before 25 July 2006, the limitation period for a crime of that category was two years.
[27] According to the amendments, the limitation period for official misconduct under Articles 332-3421 was determined as 15 years.
[28] See supra note 24.
[29] ibid.

The aforementioned justification and arguments of the Supreme Court are in full compliance with the judgment of the Constitutional Court of 13 May 2009. Indeed, if a new limitation period is established by law, the new law shall be applied even if it aggravates the condition of a person, unless such aggravation takes place after the expiration of the limitation period. In that case, according to the judgment of the Constitutional Court, the new law shall not be retroactive.[30]

2. INTERPRETATION OF THE SUPREME COURT OF GEORGIA IN RELATION TO A CONDITIONAL SENTENCE

Unlike the interpretation of the Supreme Court of Georgia in relation to a limitation period, the Court did not uphold the judgment of the Constitutional Court of Georgia of 13 May 2009 in relation to a conditional sentence. In this case, a reference is made to the judgment of the Supreme Court of Georgia of 28 June 2016.[31]

Namely, according to the case file, by a decision of 4 June 2010 of Rustavi City Court, J. Z. was found guilty of committing a crime provided for by Article 143 of the Criminal Code of Georgia and was sentenced to seven years of imprisonment, which was considered a conditional sentence and J. Z. was sentenced to eight years of probation.

On 10 December 2013, the convicted person and the lawyers defending the interests of the convicted person filed a motion to the Tbilisi Court of Appeals and requested the revision of the decision and the reduction of the probation period due to newly found circumstances based on the fact that amendments were made to the criminal law, according to which the probation period was reduced to 1 to 6 years. Therefore, according to the arguments of the defence, the new law, which provided for the grace terms for convicted persons, should have been retroactive.[32]

The Chamber of Cassation did not grant the above claim and stated that a conditional sentence imposed on a convicted person under the Criminal Code of Georgia and the related probation period did not constitute punishment, but rather a special regime of serving a sentence, provided for by the legislation. Thus, such amendments to

[30] See supra note 4. Cf. See also Merab Turava and Nino Gvenetadze, Methodology of Delivering Judgments in Criminal Cases (2005), p. 17; Turava, supra note 1, 29. This position is also upheld in one of the decisions of the Supreme Court of the United States (Stogner v. California, 123 S. Ct. 2446 (2003)), according to which the California law that provided for the renewal of criminal prosecution after the expiration of the limitation period was considered a violation of Section 9 of Article 1 of the Constitution of the United States that prohibits the passing of ex post facto law. The Court stated that as the person was no longer liable due to the expiration of the limitation period, but the liability had been imposed on the person under a new law, this situation is equivalent to the situation where a specific act was not punishable, but became punishable under a new law.

[31] Judgment of the Supreme Court of Georgia in Case No 8ას-16, 28 June 2016.

[32] ibid.

the law could not have been a ground for reviewing a decision due to the newly found circumstances, as criminal law is retroactive only when it completely annuls criminal liability for the commission of an act or mitigates punishment. A conditional sentence, as stated by the Court, is neither a form of punishment nor a form of serving a sentence.

Thus, the Chamber of Cassation completely upheld the motives and substantiation of the Court of Appeals in relation to the motion and stated that, in this case, there were no legal grounds for annulling the appealed judgment.[33]

3. INTERPRETATION OF THE SUPREME COURT REGARDING THE BLANKET PROVISIONS PROVIDED FOR IN CRIMINAL LAW

The observance of the principle of non-retroactivity in relation to blanket provisions provided for in criminal law is one of the important issues. In this regard, certain judgments from Georgian judicial practice will be analysed. One of such judgments was delivered by the Supreme Court on 10 September 2009.[34]

The case was as follows: N. Ch. was found guilty on 9 September 2008 and was sentenced to 1 year of imprisonment as provided for by Article 273 of the Criminal Code of Georgia, which was considered a conditional sentence for the probation period of the same duration. According to the judgment it was established that N. Ch. had illegally consumed narcotic drugs, an act committed by a person on whom an administrative penalty was previously imposed for such an act. The act committed by the convicted person was as follows:

On 12 June 2007, a fine of GEL 500 was imposed on N. Ch. as an administrative penalty by the decision of Gori District Court for illegal consumption of narcotic drugs without a medical prescription. Despite the above, after the imposition of an administrative penalty N. Ch. repeatedly committed the same act, namely, on 25 June 2008, N. Ch. found a narcotic drug in Kutaisi and personally consumed it.

In the claim, N. Ch. requested the annulment of the decision of Gori District Court of 9 September 2008 due to newly found circumstances, and the termination of criminal proceedings on the grounds that, on 27 March 2009, amendments were made to the Administrative Offenses Code of Georgia, according to which a person who has not committed a new administrative offence during one year after having served the penalty, was deemed not to have been subjected to an administrative penalty. Thus, the convicted person stated in the claim that the condition of the convicted person improved based on a new legislative regulation, as one year had passed after the imposition of

[33] ibid.

[34] Judgment of the Supreme Court of Georgia in Case No 41ბს-09, 10 September 2009.

the fine as a penalty, because for the first time, the convicted person illegally consumed narcotic drugs on 12 June 2007, and for the second time, on 25 June 2008.[35]

The Chamber of Cassation examined the substantiation of the claim and held that it should have been rejected. In this regard, the Court made the following interpretation: "The criminality of an act and the punishment is determined only by the Criminal Code of Georgia, Article 3 of which clearly states that criminal law is retroactive only if it decriminalises an act or reduces penalty. Therefore, the statement of the author of the claim regarding the termination of criminal proceedings against the convicted person due to the amendments made to the Administrative Offenses Code of Georgia is groundless."[36]

Thus, the Court rejected the claim on the grounds that the above-mentioned legislative amendment was related to the provisions of the Administrative Offenses Code of Georgia, not the amendments to criminal law.

The Supreme Court made a similar interpretation in another case as well. Namely, a judgment of the Supreme Court of Georgia of 28 May 2008.[37] In the said case, T. Dz. was convicted of a crime under Article 214 of the Criminal Code of Georgia. In particular, according to the judgment it was established that T. Dz. had violated the customs procedure, i.e. had moved large quantities of movable property, in particular stationery, across the customs border of Georgia by circumventing customs control, involving deceptive use of means of identification.

Later, by the edict of the President of Georgia of 25 July 2006, an amendment was made to the Law of Georgia on Customs Duties and Taxes, according to which customs duties on stationery were annulled. The defence stated that the situation of the convicted person improved as a result of the above amendment and, therefore, the law should have been retroactive in that case.

However, the Chamber of Cassation rejected the claim and stated that criminal law is retroactive only if it decriminalises an act or reduces the penalty. Therefore, the Court stated that the reference of the author of the claim to the edict of the President of Georgia was groundless.[38]

[35] ibid.
[36] ibid.
[37] Judgment of the Supreme Court of Georgia in Case No 33-ბსზ., 28 May 2008.
[38] ibid.

IV. ANALYSIS OF THE PRACTICE OF COMMON COURTS IN RELATION TO A PRINCIPLE OF NON-RETROACTIVITY

1. ANALYSIS OF THE INTERPRETATION OF THE SUPREME COURT OF GEORGIA IN RELATION TO A CONDITIONAL SENTENCE

A judgment of the Supreme Court of 28 June 2016 and its substantiation contradict the purpose of the part of the judgment of the Constitutional Court of 13 May 2009, which contains the Court's reasoning about a conditional sentence.

In particular, the Constitutional Court states: "When a conditional sentence is established beside punishment, it would be a mistake not to consider its influence on the existence of such punishment. In particular, the existence of a conditional sentence guarantees that there is a possibility that punishment would not be applied in its traditional form. When a conditional sentence is imposed on a person instead of serving a sentence, it indirectly indicates to more privilege than the mitigation of punishment. By that normative provision, the legislator enables a subject of crime to avoid punishment. Thus, the lifting of a conditional sentence for a criminal act after its commission shall be considered an indirect toughening of punishment, even though it is not provided for by the system of punishments. It should be taken into consideration that conditional sentence belongs to the system of indirect punishments. It is accessory in nature, as there is no conditional sentence without punishment, and in that sense, it accompanies the punishment. It is not evaluated separately and, thus, it influences the punishment."[39]

Although a conditional sentence is not included in the system of punishments, the lifting of the conditional sentence for a criminal act after its commission must be considered an indirect toughening of punishment.[40] A number of Georgian scholars agree with that opinion. For example, Professor *Merab Turava* agrees with the judgment of the Constitutional Court and with the opinion that a conditional sentence belongs to the system of indirect punishments,[41] and if the conditional sentence is lifted for a criminal act after its commission, it must be considered an indirect toughening of punishment and, therefore, such law must not be retroactive.[42]

[39] See supra note 4.

[40] Cf. ibid.

[41] There is another opinion in legal literature as well, according to which a conditional sentence does not belong, either directly or indirectly, to the system of punishments, and some authors refer to a conditional sentence as a measure of correction and prevention, which enables a convicted person to prove, during the probation period, that for his/her correction it is not necessary to actually serve a sentence. Cf. Nona Todua, "Conditional Sentence" in Nona Todua (Ed.) Liberalization Trends of Criminal Law Legislation in Georgia (2016), pp. 367-380; Nona Todua (Ed.) Criminal Law, General Part (Third edition, 2018), pp. 351-356; Nona Todua, et al. Sanctions in Criminal Law (2019), pp. 124-127.

[42] Cf. Turava, supra note 2, 562; Turava, supra note 1, 27, 31. It is notable that, according to the practice of the European Court of Human Rights, even in the case of extending the timeframe of a social protection measure after committing an act, sentence 2 of the first paragraph of Article 7 of the European Convention

Professor *Irakli Dvalidze* also agrees with the opinion that a conditional sentence is accessory in nature, as it cannot become effective without the imposition of punishment.[43] Professor *Maya Ivanidze* also believes that, although a conditional sentence is not a form of punishment, "...this issue should still be resolved according to the rules of retroactivity of criminal law...".[44]

Thus, when imposing punishment, if a person is deprived of the possibility of mitigating the punishment, which he/she enjoyed at the time of committing a crime, from the point of view of the Constitutional Court, it should be considered as the toughening of the punishment.[45] Therefore, the above reasoning of the Supreme Court in relation to a conditional sentence cannot be agreed with, and it contradicts a judgment of the Constitutional Court of 13 May 2009.

2. ANALYSIS OF THE INTERPRETATION OF THE SUPREME COURT OF GEORGIA IN RELATION TO THE BLANKET PROVISIONS PROVIDED FOR IN CRIMINAL LAW

The Criminal Code of Georgia can be divided into two areas: (1) classic torts, and (2) so-called "blanket torts". Classic torts are murder, theft, rape, etc. The violation of rules is attributable to blanket torts. More specifically, in this case, there is a disregard for specifically established rules in certain areas of the public life of people. For example, when driving a car, drivers must follow specific rules established by criminal law.[46]

Based on the above judicial practice, there is not a clear answer to the question whether or not the non-retroactivity of law should apply to blanket torts, when a special law applicable to such crimes is mitigated. Both a judgment of 10 September 2009 and a judgment of 28 May 2008 of the Supreme Court of Georgia require detailed analysis in this regard. In this case, it would be appropriate to start the discussion of the problem by clarifying the content of Article 3 of the Criminal Code of Georgia.

is violated (it is inadmissible to impose on a person a stricter punishment than the one applied at the time of committing a crime). See a decision of the European Court of Human Rights in Case No 30060/04 Jendowiak v. Germany, 14 April 2011, para 40.

[43] Irakli Dvalidze, General Part of Criminal Law, Sentence and Other Criminal Consequences of Crime (2013), p. 128.

[44] Cf. Nona Thodua et al., supra note 41, 124-127.

[45] Cf. Turava, supra note 2, 562. The Supreme Court of the United States has the same position as well. In particular, the United States judicial practice of a so-called "earned time credits" system is also in favour of a request related to a conditional sentence, under which the law reduced the number of days that were considered extra for a prisoner, which resulted in the extension of a term of imprisonment of the prisoner by two years (Weaver v. Graham, 450 U.S. 24, 1981). As the aforementioned law significantly changed the consequences of committing a crime, the possibility of early release was limited and the punishment for the crime toughened, thus, violating the principle of non-retroactivity. See supra note 4.

[46] Cf. Gamkrelidze, supra note 1, 255; Lavrenti Maghlakelidze, Intent and Awareness of Unlawfulness According to Georgian and German Criminal Law, Comparative Legal Analysis (2013), pp. 73-76.

2.1. The issue of interrelation between Article 3 of the Criminal Code of Georgia and Article 31(9) of the Constitution of Georgia

According to Article 3 of the Criminal Code of Georgia, as stated above, a criminal law that decriminalises an act or reduces penalty is retroactive, and on the contrary, a criminal law that establishes the criminality of an act or toughens the penalty is not retroactive. Therefore, the above provision of the Criminal Code regulates the issue of retroactivity of criminal law.[47] For clarity, the latter can be conditionally divided into two stages: The first stage lays down general provisions regarding the cases in which law is, or on the contrary, is not retroactive (Article 3(1)), and the second stage determines at which stage law becomes retroactive (Article 3(2) and (3)).[48]

It can be said that the above regulation of Article 3 of the Criminal Code of Georgia reiterates the provision of Article 31(9) of the Constitution of Georgia. A law (any law, not just criminal law) is not retroactive, unless it mitigates or annuls the liability. According to the interpretation of the Constitutional Court of Georgia, as stated above, "a guarantee of non-retroactivity is the guarantee for the entire criminal law, as an organic combination of provisions, not just for a certain part of it".[49]

Therefore, according to the interpretation of the Constitutional Court of Georgia, Article 31(9) of the Constitution of Georgia refers to all provisions of law that establish legal liability in any form. Thus, the position of the Supreme Court that only criminal law can be retroactive and only in relation to so-called "classic torts" should be considered incorrect.[50]

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[47] Similar provisions are provided for in both the Administrative Offenses Code of Georgia and the Civil Code of Georgia. Article 9, the Law of Georgia Administrative Offenses Code of Georgia <https://matsne.gov.ge/document/view/28216?publication=498> [last accessed on 15 March 2022]; Article 6, the Law of Georgia Civil Code of Georgia <https://matsne.gov.ge/ka/document/view/31702?publication=118> [last accessed on 15 March 2022].

[48] For more details, see Kharanauli, supra note 1, 53-57.

[49] See supra note 4.

[50] It is noteworthy that the issue of retroactivity of law is regulated differently in the Criminal Procedure Code of Georgia. In particular, according to Article 2(1) of the Criminal Procedure Code of Georgia, provisions that are in force at the time of an investigation and a court hearing are applied during criminal proceedings. According to Article 2(2) of the same Code, the amendments made to criminal procedure law result in the annulment or change of the previously adopted procedural act, provided that this improves the condition of the accused (convicted) person. According to the judgment of the Constitutional Court, "the relation of the procedural legislation to the retroactivity is mostly excluded in its basis, as it regulates procedures that are being carried out in time, and are continuous, dynamic ..., irrespective of the time of the commission of a crime. Therefore, a law applicable to their development (relations) must be applied to current relations". In this regard see supra note 11. The above substantiation of the Constitutional Court was later used by the Supreme Court in one of its judgments, stating that Article 2 of the Criminal Procedure Code of Georgia, which establishes the procedure for the application of the criminal procedure law in time, applies to the procedural and legal relations which, as a rule, have not been completed by the time of entry into force of new provisions, or fulfil the preconditions provided for by Article 310 of the Criminal Procedure Code of Georgia. According to the Supreme Court, the annulment or change of

There may actually be only a slight "contextual difference" between the provision of Article 31 of the Constitution of Georgia and Article 3 of the Criminal Code of Georgia. In particular, under Article 31 of the Constitution of Georgia, retroactivity must be applied only if law mitigates or annuls the liability, while the Criminal Code of Georgia narrows this provision in terms of non-retroactivity of law and provides two types of guarantees: (a) if a criminal law establishes the criminality of an act or (b) toughens the punishment, it must not be retroactive.[51]

Otherwise, if it is assumed that both of the above legal acts provide different legal guarantees for a person, it may lead to a completely illogical conclusion, for example, one of such conclusions may be that a provision of the Constitution regarding the non-retroactivity of law is a general provision, while Article 3 of the Criminal Code is a special provision; therefore, in the case of the competition between the two provisions, the authority applying them would use a special provision, i.e. only a criminal law, which, of course, would not be correct.[52]

It is generally recognised that the Constitution is the highest legislative act in the hierarchy of provisions. The Constitution is at the top of the hierarchy, which is followed by all other normative acts, including the Criminal Code, the Administrative Offenses Code, the Civil Code, etc. The Constitution is an act of the highest rank in the system of subordination not only because the procedure for its adoption is different but also because qualitatively, in terms of its value, it is the most complete normative act.[53] Therefore, due to those characteristics, it constitutes the basis for all normative acts. That circumstance gives special importance to the preparation of constitutional provisions in compliance with certain recognised standards.[54]

Therefore, the authority applying provisions must, first of all, use the provisions of the Constitution of Georgia, and then the legislative acts regulating specific legal relations.[55]

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the previously adopted procedural act is not provided for in other cases. In this regard see a judgment of the Supreme Court of Georgia in Case No 16ას-19, 3 February 2020; judgment of the Supreme Court of Georgia in Case No 36ას-19, 25 February 2020; judgment of the Supreme Court of Georgia in Case No 747ას-21, 1 March 2021.

[51] Cf. Diasamidze, supra note 5, 79-80.

[52] It is correctly recognised in the legal doctrine that a constitutional provision shall not be interpreted on the basis of a subordinate provision. In this regard see Tamar Shavgulidze, "Significance of Interpretation of the Constitution for Common Courts and Constitutional Norm Control" (2021), p. 25, Constitutional Law Review, p. 115.

[53] Cf. Besarion Zoidze, Problems with the Verification of Constitutional Norms and Constitutionality (2015), p. 8, Constitutional Law Review, pp. 3-17.

[54] Cf. ibid, p. 15.

[55] In such cases, the Organic Law of Georgia on Common Courts recommends that a judge makes a submission to the Constitutional Court which, of course, is the simplest and most pragmatic way to resolve that problem. In particular, under Article 7(3) of the Law, "if during the hearing of a particular case the court infers that there is a sufficient basis to believe that a law or any other normative act to be applied by the court in deciding the case may be deemed incompatible, in full or in part, with the Constitution of

In addition, it is possible that the authority applying a provision does not interpret it literally, as was the case with the Supreme Court in the above-mentioned cases, but rather in accordance with the Constitution,[56] thus reaching the desired result.[57]

2.2. Interpretation of Article 3 of the Criminal Code of Georgia in compatibility with the Constitution of Georgia

The method of interpretation compatible with the Constitution is widely spread in legal practice.[58] The contextual access to the Constitution and, subsequently, its realisation in the legal order, are the main objectives for any legal system.[59] The interpretation compatible with the Constitution is especially important in that process, as it forms a decisive basis for the actual incorporation of constitutional principles in the legal order.[60] In this regard, it is very important to recognise the idea of the entirety of the legal system.[61] The main idea is that certain legal provisions do not stand beside each other separately, without a systematic connection between them, instead law constitutes a unified system. As German scholar *Friedrich Carl Von Savigny* states, single legal concepts and rules form one big unity.[62] Therefore, the principle of "unity of law" must be followed in the interpretation of legal provisions, i.e. judgments delivered as a result of the interpretation must not contradict other legal provisions, especially the provisions that are on the same or higher hierarchical level.[63]

Georgia, it shall suspend the hearing and apply to the Constitutional Court of Georgia. The hearing shall be resumed after the Constitutional Court of Georgia has made a decision on the matter."

[56] Such interpretation may also be named "a constitution-oriented interpretation".

[57] There is an opinion in legal literature that an interpretation compatible with the Constitution does not constitute an independent interpretation method. The reason therefore may be that, in such case, the provisions subordinate to the Constitution are considered within the framework of main laws and constitute a type of systematic interpretation, because if there is a possibility of two or more interpretations of a provision, one of which leads to the results compatible with the Constitution, and the other leads to the results that contradict the Constitution, only the interpretation compatible with the Constitution must be chosen. In this regard see Shavgulidze, supra note 52, 107-108.

[58] It is noteworthy that the method of interpretation compatible with the Constitution is common in administrative proceedings as well. In particular, the Chamber of Cassation made the following interpretation regarding a judgment of 20 June 2019 of the Supreme Court of Georgia: the interpretation of provisions compatible with the Constitution should be ensured in the judicial practice; common courts are not authorised to inappropriately interpret the judgments of the Constitutional Court. According to the same judgment, "if a court hearing the case believes that a normative act is incompatible with the Constitution of Georgia, the court shall deliver a judgment in compliance with the Constitution of Georgia". In this regard see a judgment of the Supreme Court of Georgia in Case No ბს-857-853, 20 June 2019. A similar opinion is upheld in earlier judgments as well, for example, a judgment/decision of the Supreme Court of Georgia in Case No ბს-776-768(2კ-4კს-15), 14 July 2016.

[59] Cf. Shavgulidze, supra note 52, 104.

[60] ibid.

[61] Cf. Reinhold Zippelius, Introduction to German Legal Methods (tenth edition, 2006), pp. 53-54.

[62] Friedrich Karl von Savigny, "System des heutigen Römischen Rechts" in Zippelius, supra note 61, 54.

[63] ibid, p. 60.

Therefore, the application of one article of law equals the application of the entire legal system. Accordingly, in modern law, there is a concept of unlawfulness in a broad sense as a contradiction to cultural norms, but not in its narrow sense in a form of criminal unlawfulness.[64] Thus, the "network" of the Georgian, as well as the European legal system, does not exist within the framework of one field of law, but it is interdisciplinary in nature.[65] Private law and public law are not isolated and autonomous microworlds, but they have multilateral legal relations with each other.[66] Therefore, the interpretation of any legal provision should be based on the compatibility with the Constitution. The authority applying legal provisions should make constitutionally conforming interpretation in order to establish the compatibility of a provision with the Constitution.[67]

Thus, in this case, the following formulation provided in the law "criminal law that decriminalises an act or reduces the penalty for it shall be retroactive" should be interpreted in accordance with the Constitution[68], but not literally, because the majority of crimes provided for in the Criminal Code have blanket context, which indicates that the preconditions for the criminality and punishability of an act are determined by special laws, normative acts. Accordingly, any change made in them, which may alleviate or improve the legal condition of a person, should be reflected in the court judgments made in favour of an accused/convicted person. The Constitutional Court followed the above logic in reviewing one of the cases.[69]

In particular, in this case, the subject of the dispute was the constitutionality of the words "this Code" in Article 72(1) of the Criminal Procedure Code of Georgia in relation to Article 42(7) of the Constitution of Georgia (previous version).[70] More specifically, a claimant who was accused of committing an act provided for by Article 180(3)(b) of the Criminal Code of Georgia, requested the court to declare the said provision of the Criminal Procedure Code of Georgia as unconstitutional.

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[64] The concept of "unlawfulness" was formed in the legal literature at the end of the 19th century. The formation of the concept is related to a famous German scholar Karl Binding, who was the first to formulate the theory of unlawfulness in his doctrine "The Theory of Norms". See Karl Binding, Die Normen und ihre Übertretung. Band 1, (4. Auflage, 1922), pp. 4-7. Later, the concept of unlawfulness was broadened and developed by German scholar M. E. Mayer. See Max Ernst Mayer, Der allgemeine Teil des deutschen Strafrechts (1915), pp. 9-10. In Georgian see Turava supra note 1, 163-168; Maghlakelidze, supra note 46, 65-69 and 174-179.

[65] Cf. Turava and Gvenetadze, supra note 30, 43-44.

[66] ibid.

[67] ibid, p. 44.

[68] ibid.

[69] Judgment of the Constitutional Court of Georgia in Case No 2/2/579 "Citizen of Georgia Maia Robakidze v. the Parliament of Georgia", 31 July 2015.

[70] Before that judgment of the Constitutional Court, Article 72(1) of the Criminal Procedure Code of Georgia was formulated as follows: "evidence obtained as a result of the substantial violation of this Code and any other evidence lawfully obtained based on such evidence, if it worsens the legal status of the accused, shall be considered inadmissible and shall have no legal effect."

The case was as follows: the prosecution presented the evidence at the pre-trial hearing, which was based on the information obtained by a private person in violation of the Criminal Code of Georgia and the Law of Georgia on Operative Investigatory Activities. On the above grounds, the defence filed a motion to the court and requested the declaration of the submitted evidence as inadmissible. The court rejected the motion, however, as a summary judgment had not been delivered in the case, and in addition, there was a possibility that a higher instance court could have delivered a different judgment regarding the admissibility of the evidence, the claimant filed a claim to the Constitutional Court and requested the declaration of the disputed provisions as unconstitutional.

According to the claimant, under the Criminal Procedure Code of Georgia, the evidence was inadmissible only if it was obtained as a result of the substantial violation of "this Code", i.e. the Criminal Procedure Code of Georgia, but not as a result of the substantial violation of the procedure established by other normative acts, such as the Criminal Code of Georgia, the Law of Georgia on Operative Investigatory Activities, and the Law of Georgia on Police. In addition, the claimant stated that, under the disputed provision, the evidence obtained in accordance with the procedures established by the above normative acts was also admissible, although a reasonable doubt has not been refuted that it has been replaced, or that its properties have been substantially changed, or that the traces remaining on it have substantially disappeared.

The Constitutional Court partially granted the claimant's request and stated that "in the present case, the procedure established by the provision of Article 72(1) of the Criminal Procedure Code of Georgia exists without exceptions. This provision applies generally and it does not refer to any preconditions that would narrow and make exceptional the cases of attributing legal effect to the evidence obtained in violation of law. Attributing legal effect to the evidence obtained in violation of the law encourages, in all cases and without any exception or narrowing, the arbitrariness of the state bodies obtaining evidence, and poses irreversible risks of violation of the rights and freedoms of a person. Such an approach poses a risk of violation of human rights and freedoms in the process of obtaining evidence, and contradicts the objective of Article 42(7) of the Constitution of Georgia".[71]

Based on the above, the Constitutional Court of Georgia ruled that the words "this Code" in Article 72(1) of the Criminal Procedure Code of Georgia are unconstitutional in relation to Article 42(7) of the Constitution of Georgia (previous version).

Thus, the Constitutional Court declared as unconstitutional the provision of Article 72(1) of the Criminal Procedure Code of Georgia, according to which only the evidence obtained as a result of the substantial violation of "this Code" was inadmissible, and

[71] See supra note 69.

stated that such literal legal definition posed irreversible risks of violation of the rights and freedoms of a person.

Based on the above reasoning, a logical conclusion may be made that the wording provided in the Criminal Code of Georgia "a criminal law that decriminalises an act or reduces the penalty for it shall be retroactive" should not be interpreted literally, but in accordance with the Constitution of Georgia, and the words "criminal law" should cover both so-called classic and blanket provisions of the Criminal Code.[72]

V. CONCLUSION

Thus, the guarantee function of criminal law is of utmost importance for making a correct decision regarding the criminal liability of a person. The above cases provide a clear example of how correctly that significant principle of lawfulness is realised in the judgments made by domestic courts. I think, in this regard, domestic courts pay less attention, on the one hand, to the correct interpretation of provisions, and on the other hand, to the legislative hierarchy established by the Constitution.

To sum up, based on the above analysis, the following important circumstances may be emphasised when discussing this problem:

(1) non-retroactivity of law applies not only to the provisions of the private part but also of the general part of criminal law, including a conditional sentence and a limitation period;

(2) the guarantee of non-retroactivity is a guarantee provided for the entire criminal law, as an organic combination of provisions, and not just for one of its parts;

(3) the wording provided in the Criminal Code "a criminal law that decriminalises an act or reduces the penalty for it shall be retroactive" should be interpreted in accordance with the Constitution, which means that it should cover not only so-called "classic torts" but also so-called "blanket torts" of criminal law. Therefore, any legislative change that is related to the liability of a person should be retroactive only if it improves or completely excludes criminal liability.

[72] Certain provisions of Chapter XXXIII – Drug-related Crime of the Criminal Code of Georgia also belong to blanket torts, which are being significantly revised as a result of the recent legislative amendments. Such changes may cause, in one case, the toughening, and in another case, the mitigation or complete exclusion of criminal liability against a person. The analysis of the recent practice of the Supreme Court clearly indicates that the court applies retroactively the changes made in those provisions if they improve the legal condition of an accused or a convicted person. For example, see a judgment of the Supreme Court of Georgia in Case No 79ას-20, 3 June 2021; and a judgment of the Supreme Court of Georgia in Case No 58ას-20, 10 December 2020.