REZUMATUL TEZEI DE DOCTORAT

(ENGLEZA)

The principle of retroactivity of the more favorable criminal or contravention law

The issue of this paper imposed division of thesis in three interrelated parts, namely a first part that identifies the origin and foundation of which were the basis of all aspects that the legal institution of non-retroactivity of the law presents, a second part which looks strictly at the retroactive technique of the most favorable criminal or offenses law starting from enforcement of criminal and conventional law in time and also addressing the problems that arise when determining whether a more favorable criminal or offenses law relating to specific cases in European courts and national practice and in the last part, III we leave the purposes of retroactivity terminology and relate only to the foundation and guarantees of non-retroactivity of criminal law, focusing especially on the consequences it entails the application of this principle whose meanings at European level grant the impunity it has today. These three parts receive as "Parties" and each disheveled several chapters, sections and subsections.

The first part of the thesis captures the most important aspects of the institution of non-retroactivity of the law, which resulted in a historical and philosophical approach as a starting point in researching reserved to retroactive criminal laws. The historical analysis made to legal retroactivity led to the identification of its origin and premises, as well as how it was perceived in other legal systems.

Regarding the philosophical approach of non-retroactivity of the law we have shown that there have been several attempts to define the content of non-

retroactivity of the law both by doctrine and case law. In law, retroactivity law requires first of all that this must not lead to situations whose effects are carried under the legislation of date. Also new law is not applicable to the legal situation whose effects were entirely consumed in the previous norm empire[1].

In a separate section about the definition of retroactivity are clarified the meanings of this legal institution by exposing the consequences that entails the time in terms of retroactivity and presenting retroactivity challenges posed by the notion of retroactive law. On this occasion it is showed the etymology of "retroactivity" word and presented succinctly the linguistic form which was the basis of this concept.

A careful analysis of the concepts of retroactive law is noted that this is primarily due to the ambiguity of the term “retroactive” and then to the law. This finding is a consequence of the fact that retroactivity unconsciously evokes an idea that is impossible in law: to work in the past, over time, more than a mere retrospective it means to act on the past. We thus highlight the characteristic feature of retroactivity; that it requires an effect in the past, the retroactive effect that Merlin describes as "the product of causes that act on the past."

Thus time may be considered an essential element in ensuring stability of legal relations which leads to retroactivity be considered a purely legal concept, stolen from irreversibility of time though, as the legal act, any law is subject abscissa of time[2].

In the process of outlining the issues for law enforcement in time, doctrine and legal practice have shown that this problem has given rise to many controversies regarding the choice between retroactivity or non-retroactivity of

[1] Olivier Debat, La retroactivite et le droit fiscal, Ed. Defrenois, Paris, 2006, pag.125.
[2] Gh.Dănişor, Filosofia drepturilor omului, Ed.Universul juridic, Bucureşti, 2011, pag.71-72., I.Dogaru-coordonator, Ideea curgerii timpului şi consecinţelel ei juridice, Ed.All Beck, Bucureşti, 2002, pag.70.

laws and in this respect several theories have emerged, among the best known and controversial at the same time were: theory of won rights and theory of legal situations supported by P.Roubier.

In the theory of won rights it received much criticism, critiques that have reported that it is not applicable outside the private law, respectively it is not applicable to criminal law field and also it is not compatible with retroactivity analysis in relation to non-patrimonial rights. Adherents of this theory found for example that the immediate effect of the new law is a case of retroactivity[3]. All this seems to be due to the fact that the rights won are too subjective, difficult to define.

Later this criterion was replaced by the doctrine with the criterion of legal situations founded by Paul Roubier showing that it would be necessary to differentiate between subjective rights and legal situation, between legal rules and legal situations. While individual rights are prerogatives close to subjects and they may provide the genuine goods, next to them there are objective situations that arise on the basis of legal rules, legal norms instead correspond to a general and abstract rules that govern legal relations in society and legal situations correspond to some individual and concrete situations where people can find each other on the basis of legal rules[4].

Regarding the case law of Romania, it seems to opt not only for a theory but rather for both depending on the specifics of each situation. Instead we can say that the new civil code opts for the theory of legal situations, arguing in article 6 paragraph 1 that "*Civil law is applicable as long as it is in force. It does not have retroactive power*."

---

[3] D.C.Dănişor, Drept constitutional şi instituţii politice, Teoria generală,Ed. C.H.Beck,Bucuresti,2007,pag.575.

[4] D.C.Danisor,Drept constitutional si institutii politice,Teoria generala,Ed C.H.Beck,Bucuresti,2007,pag575.

Thus art.6 of the New Civil Code, which governs the temporal application of the civil law, governed by the general principle tempus regit actum enshrines as an expression of the principle of legal security the non-retroactivity principle of new civil law to acts, deeds and legal situations concluded, performed or accomplished or as appropriate, arose before the entry into force of the new law and of the principle of immediate application of new civilian law on all acts and deeds entered into or, if applicable, accomplished or committed after the entry into force and legal situations arising after that date.

According to the latest doctrine it was considered that the justification of non-retroactivity was defined according to the dominant conception, namely an individualistic conception and design that puts at the beginning the conflict of laws interest. According to the individualistic conception, it is based on the protection of law subjects against the law, i.e. subjects of law cannot be forced to follow future rules. The concept seems to have been adopted by our law system when with the 1991 Constitution was constitutionalized the principle of non-retroactivity of the law[5]. This was a consequence of a transition phase, a transition from a communist society to a capitalist society characterized by a realistic vision offering a functional and utilitarian character to the law.

Regarding the second fundamental concept based on the general has an interest that the law does not become ineffective, an approach that seems to be the dominant one today and this implies that non-retroactivity is not absolute and safety of persons is surpassed by the general interest which prevails.

Once the foundation of this institution established, we went to its exhaustive analysis from evolutionarily perspective of contemporary society. Further, we showed that the climax to the principle of retroactivity of the more favorable

[5] I.Dogaru-coordonator, Ideea curgerii timpului şi consecinţelel ei juridice, Ed.All Beck, Bucureşti, 2002, pag.69.

criminal or offenses law was to raise this principle to a constitutional level. Rule regarding criminal laws is that this does not retro activates, this non-retroactivity of criminal laws being the only one constitutionalized given the extreme repressive nature of this type of law. Also as a general rule this principle became in the Romanian law a constitutional rule, the more favorable criminal law retro activates.

Law amending the Constitution nr.429/2003 approved by national referendum in 2003 extended the principle of mandatory retroactivity imposing it for the more favorable contravention laws. This expansion is in line with the European Court of Human Rights which interprets the term "criminal matters" in an extensive manner using a material criterion, including all rules in this area that have a penalty which is in the same time preventive, dissuasive and repressive.

Given the distinct constitutional character of the retroactivity principle of the more favorable criminal or offenses law, the legislature cannot refuse to give retroactive effect to the more favorable criminal law or prohibit retrospective application of such law.

Analyzing the principle of non-retroactivity of law in mative of European or European-inspired systems, it can see that they do not have a uniform regulation but rather the rule in each system is different, as it comes to criminal law or civil law. The most common rule in European countries is the constitutional prohibition of retroactive criminal laws, while non-retroactivity of civil laws remains a valuable legislative principle.

But neither the application of the European Convention of Human Rights has changed the way the principle was situated in mative, only in criminal systems for the systems that did not constitutionalize it, but recognize for the Convention

an over-legislative value, for art. 7 of the Convention only prohibit retroactive criminal laws, not civil ones[6].

However, a clear distinction of laws that fall within the scope of the principle of retroactivity of more favorable criminal or offenses law must be performed. Consequently we have shown that this retroactivity regards only the substantially criminal law rules, not criminal procedure rules. All procedural laws apply only to acts that will occur in their empire and therefore cannot speak of retroactive criminal procedural laws[7].

An important chapter is the one that blurs the inapplicability of the principle on the criminal procedure law. Thus the principle of binding retroactivity regards only the criminal law, not the criminal procedure law which is only forthwith applicable, so to comply with this principle the criminal law should be clearly distinguished from criminal procedure law. In other words while the criminal law is that which establishes offenses and penalties, criminal procedure law is that which determines ways of identifying and prosecuting those who commit criminal acts.

The criminal trial under procedural aspect applies only the prompt enforcement principle of Procedure Law, which requires that it applies to all acts done in the procedural activity while it is in force, regardless of the date of the offense for which the criminal charge is made and commencement of trial. So in the matter of procedural laws applies the principle tempus regit actum, without having applicability the principle lex mitior

Part II of this paper is devoted to the issue of retroactivity principle of the more favorable criminal or offenses law addressing first of all the principles of implementation in time of criminal or offenses law, and then we try to systematize

[6] Jean Pradel, Geert Costens, Droit penal europeenne, Ed. Dalloz, Paris, 2009, pag.250.
[7] Jean Larguier,Droit penal general,18-ed,Ed. Dalloz-2001,pag.277.

the problems that arise during the implementation these laws in time and we will also show how to determine the most favorable character of a criminal or offenses law in relation to specific cases in our case law, especially to the European Courts.

Finally we showed what are the trends in European courts and also to what extent this practice is perceived by national courts in respect of offenses procedure issues and the extent to which the guarantee of the presumption of innocence is complied with when considering the nature of the contravention of an act.

The legal contraventions in Romanian law are currently uncertain relative to conventional collateral insurance requirements of Art.6 of the ECHR and the constitutional contained in art.24 in terms of their qualifications as administrative acts. One of the aspects of the right of defense which is violated when committing an offense is the presumption of innocence.

The presumption of innocence is considered a distinct constitutional principle and a fundamental right, but this presumption is relative and not absolute, allowing evidence to the contrary, but it is conditioned by the provision of special safeguards for the one suspected or accused of a crime.

In another vein was noted in the literature that although in ECHR offense was considered a criminal acts, in our system was not taken this concept as it refers to a civil procedural law applicable contravention law, although we consider that more appropriate it would have been the criminal procedure law in line with European requirements. At present the problem of filling the ordinance provisions governing the offense is cleared if not in practice which is more minority than the majority, at least in the statutory provisions there is a strengthening of the autonomous nature of this contravention procedure, having regard to Article 47 of GO no.2/2001 which was amended by law no.76/2012 and read "the provisions of this ordinance shall be supplemented with the Criminal Code and Code of Civil Procedure, as appropriate."

Basically law no.76/2012 brought numerous provisions of absolute novelty in the field of offenses, not just the one shown above, clarified another old problem that of qualification of contravention domain so far as contravention pleadings and legal nature of the contravention report are considered to be outside the area of administrative law, which is clear and contained in paragraph 2 of article 32 of the Ordinance no.2/2001 offering unlimited jurisdiction to contravention courts, contrary to current opinion to the intervention of this law. Opinion that the contravention report represents an administrative act occurred after the adoption of Decree no.184/1954 by which operated a decriminalization of offenses on political considerations and the reason is based on the fact that the record is made by organs of public administration sector[8]. After the repeal of Decree Law no.184/1954 by law no.32/1968 on establishing and sanctioning violations, occurred the initiative to introduce a code of offenses on model of systems in the former socialist states and in this sense it has even been developed a preliminary draft[9].

The new definition removes the express provision of Law no. 32/1968, that the offense should have a social danger lower than the offense. The argument would be that, in time, it was proven that less social danger of the act is an insufficient criterion for the definition and delimitation of the three illegal acts (crimes, misdemeanors and misconduct), so the legislature canceled it. In practice, it was found that some illegal acts qualified by the legislature as offenses are punished more harshly than some crimes.

A careful analysis of the contravention could notice that there was a concern in the literature to define the offense; it was generally regarded as a type of socially

[8] Ursuța Mircea, Noul regim contravențional în contextul intrării în vigoare a noului cod de procedură civilă şi a legii nr.76/2012 pentru punerea în aplicare a legii nr.134/2010 privind codul de procedură civilă, Revista Dreptul nr.3/2013, pag.170-171.

[9] Anteproiectul a fost elaborat de specialişti din cadrul Institutului de cercetări juridice al Academiei Române.

inconvenient activity because injures or endangers the rights and interests of the society or individuals. Valences that they later acquired caused some general trends propagated by national courts on the establishment of the legal nature of offenses, for which we can say that is very similar to that of crime. Many lawyers have always tried to define offense in relation to the characteristics of the crime, the closeness between offense and the crime being due to their common origin. "The present legislation does not define the offense legislature by comparing its social danger to that of the crime, as Law no.32/1968 did on establishing and sanctioning offenses, but only by three elements, namely: objective side, the provision of the act in a legislative act, and done so with guilt[10]."

In light of these arguments we can say that in the Romanian legal system the distinction between these two categories is done, bowing to gravity that the act presents for certain social values, which makes the social dangers to remain a constant of the legal liability both in criminal and in contravention plan[11]. Unlike the criminal code in force, the initiators of the new Criminal Code give up the concepts of "social danger" and "degree of social danger" in the legal definition of the crime[12], something which corresponds to a liberal democratic state.

Therefore on the law to be developed, we believe it needs to draw an Offences Code to include both a general and a special part of contravention procedure governing unitary and consistent with conventional collateral requirements of Art. 6 and of those constitutional contained in art.24.

---

[10] M.A.Hotca, Regimul juridic al contravenţiilor, Comentarii şi explicaţii, Ediția 4, Ed.C.H.Beck, Bucureşti, 2009, pag.15.

[11] Antonie Iorgovan, Tratat de drept administrativ, Vol. 2, ed. 4, Ed. All Beck, București, 2005, pag. 329-345.

[12] Art. 15 din noul CP stipulează că infracțiunea este fapta prevăzută de legea penală, săvârșită cu vinovăție, nejustificată și imputabilă persoanei care a săvârșit-o, reprezentând singurul temei al răspunderii penale.

A special discussion is generates by the cases to determine when a criminal or contravention law is more favorable, and they must be determined according to the criteria to be considered to what extent the law may be more favorable to the accused than any other law. In this case on the real background of controversy due to practice of courts, was reached to the necessity of establishing clear criteria for the interpretation of the nature of law to be more favorable or less favorable to the accused.

In Part III of this paper against a broad legislative framework, developed in connection with the protection of individual rights and liberties as the purpose of the correct application of the criminal law or contrary to the possibility of a retroactive law when is more favorable. In this context it will be considered the principle of legality of criminal offenses and the principle of strict interpretation of criminal law, as well as principles and corollaries of the principle of non-retroactivity of criminal law and will also consider the role of legal security and desired finality of non-retroactivity of criminal law.

Along with the principle of legality of criminal offenses was usually established the principle of non-retroactivity of criminal law also, among other guarantees of individual freedom such as the presumption of innocence, the right to defense, the right to appeal to a higher court, the rule non bis in idem[13]. Thus conceived and formulated the principle of legality was intended to serve as a guarantee of individual freedom against arbitrary interference in the work of the judiciary and against a law that would criminalize an act which, at the time it was committed, was not provided by law as an the offense, the action of state authority being unable to carry on except in cases and within the limits of the criminal law.

[13] Dragoş Bărcănescu, Conținutul infracțiunii şi principiul legalității, Ed.All Beck, Bucureşti, 2005, pag.117.

Initially the principle of legality was considered on the procedural plan to be completed by a series of individual freedoms enshrined in the Criminal Procedure Codes of 1864 and 1936. One view is held that the principle of legality and that of non-retroactivity of criminal law are derived from the public policy nature of the rules of criminal procedure and that would require compliance of legal provisions in courts and others argued that both principles are derived from the principle of formality and compulsoriness of bodies to harness criminal prosecution according to the law.

The principle opposes that a person who committed an act which was not provided as the crime, be surprised by the appearance of a law that would criminalize the act and which would apply retroactively. It was therefore proposed that the rules nullum crimen and nulla poena sine lege be formulated as nullum crimen (nulla poena) sine lege praevia or sine lege poenali anteriori, which means that the crime and the punishment must be provided by law in time of the offense, so by an earlier law as the law must warn before punishing (lex moneat prius quam feriat).

But for these rules to work as true guarantees of individual freedom, it should be accompanied by others. It is not enough that the penalty is prescribed by law, it is also necessary that it be applied only after a judge (rule nulla poena sine judicio), and the trial to be conducted according to the law (nullum judicium sine lege).

Thus it becomes necessary that the interpretation of legal norms to be made strictly for the purpose for which they were enacted, for the protection of human rights through legal means to pass from the sphere of theoretical discussion in the practice of public authorities, notably in the sphere of the courts so they do not end up in paradoxical situation as that of a person who has committed an offense to be applied a more severe sanction regime than if they had committed an offense.

European Court closely linked the principle of legality of criminal offenses and penalties and the principle of strict interpretation of criminal law since they stem from the interpretation of Article 7 of the Convention stating in one of the cases pending that "refuses to apply analogue interpretation in malam partem, because it was practiced in totalitarian states". European court reaffirmed that although domestic courts are better placed than itself to interpret and apply national law, the principle of legality of crime and punishment contained in article 7 of the European Convention prohibits that the criminal law should be interpreted broadly to the detriment of defendant, for example by analogy further practice of the Court has demonstrated that the legality of criminal offenses require clear and precise drafting of criminal law.

The principle of legality of criminalization and penalties as set out in the European Convention on Human Rights has an over constitutional value representing an important safeguard against possible infringements of fundamental rights of citizens by the regulations contained in national legislation. In clarifying this principle, the judicial practice of the European Court of Human Rights has made a number of explanations, of which we retain the character of the *ultima ratio* of the criminal intervention and the need for written law (lex scripta), a stable legislation enabling its knowledge by citizens, and its writing in a clear manner, that every citizen can foresee the consequences of its violation (lex praevia).

Between non-retroactivity of criminal law and criminal law restrictive interpretation there is a strong connection given to the fact that the interpretation is practically a mandatory step of enforcement process, coupled with practical purpose of any interpretation, namely the compatibility between a law and a statement actually given[14].

[14] I.Dogaru, G.Dănişor, D.C.Dănişor, Teoria generală a dreptului, Ed.C.Beck, Bucureşti, 2006, pag.379.

In the outline of the principle of legality of criminal offenses and penalties was emphasized that no indictment and no punishment can "exist" without being provided by a text emanating from public authorities and preventive for citizens in relation to what should they do or not do risking to be exposed to a criminal penalty[15].

Freedom of citizens would be seriously threatened if a government might pursue them for acts that were not punishable by a pre-existing text notified to them. There is such a fundamental legal rule that tends to prevent arrest or abusive prosecution, and as a corollary a principle. Under this double title appeared the principle of legality which is particularly important being enrolled in many constitutions and in certain declaration of human and citizen rights.

The rules of the new Criminal Code which will come into force on February 1 2014 the principle of legality of criminal offenses and penalties is regulated in two distinct texts (article 1 and article 2) and as a novelty the principle was completed by the rule of criminal provision precedence standard to the facts and punishment or safety or educational measure that would apply for the act committed[16].

Research of the basics and the aims of legal security could not miss in the analysis of non-retroactivity of criminal law as in the analysis of the legality regarding criminalizing; all these concepts are inextricably linked to the idea of a state. But what prevails in legal security is actually the quality of the regulation that is dependent of a certain quality of law in the sense of predictability and affordability. Appearance is largely due to reception by the Constitutional Court of the principles and judgments frequently invoked by the European courts.

---

[15] Bernard Bouloc,Droit penal general et procedure penal, ed.15,2004,pag.41.

[16] Duvac Constantin, Studiu comparativ introductiv asupra noului cod penal român şi codului penal român de la 1969, Revista Dreptul nr.5/2013, pag.165.