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APPLICATION OF THE LEX PRAEVIA PRINCIPLE TO COURT INTERPRETATION

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ABSTRACT*

A criminal law that criminalizes an act or increases punishment for it shall not have retroactive force. The aim of this paper is to explore to what extent *lex praevia* applies to a judicial interpretation of a provision when it broadens the definition of crime or makes a punishment heavier while the provision itself remains unchanged. Opinions on this issue vary in academic circles and in court practice, which make this issue worth exploring.

Some lawyers believe that *lex praevia* applies to the law alone and not to its interpretation. According to this opinion, any other approach would conflict with the essence of the law, which must be able to evolve along with the development of society in order to meet new challenges. Other lawyers argue, however, that the law is defined by how it is interpreted by a court in real time, when the trust in it is legitimate. According to this view, *lex praevia* should also apply to judicial interpretation when it broadens the boundaries of liability.

This paper takes the position of the latter opinion. Due to the abstract nature of a provision, it is the function of a court to elucidate it and adequately communicate it to the public, and the interpretation of this provision should also as trustworthy and stable as the law itself for the addressee and must not come as a surprise to him/her post factum.

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Criminal law in a legal state has a guaranteeing function ensured by the following requirements: the prohibition of the application of non-statutory law (*lex scripta*); the prohibition of analogy (*lex stricta*); the prohibition of indeterminate legal provisions (*lex certa*); the prohibition of retroactive application of criminal law (*lex praevia*).¹ These prohibitions follow from one another, and in their entirety, they create legal stability and security.

Since this paper aims to discuss the application of the prohibition of the retroactivity of a law to a judicial interpretation of a provision, it would be suitable to start with a brief overview of the *lex praevia* principle.

The idea of the non-retroactivity of the law, which belongs to renowned German scholar A. Feuerbach,² is related to the preventive function of punishment. It also relates to the obligation of advance warning for the provision's addressee in order to avoid any arbitrary use of state authority as well as to the right of an individual to be aware of a prohibited action in advance, which is a guarantee of his/her freedom.³ In H. Packer's view, the most significant reason why the law must not be used retroactively is not that retroactivity causes **fair surprise** in the addressees but that it dismantles the guarantee of security that a new law will not be used against any of us tomorrow,⁴ which would undermine a legal state.⁵ The issues of the retroactivity of the law is specified in Paragraph 9 of Article 31 of the Constitution of Georgia, which states that "No one shall be held responsible on account of an action, which did not constitute a criminal offence at the time it was committed. The law that neither mitigates nor abrogates responsibility shall have no retroactive force." This constitutional provision is reflected in Article 2 and 3 of the Criminal Code of Georgia. Pursuant to Article 2 of the Code, "The criminality and punishability of an act shall be determined by the criminal law applicable at the time of its commission," while according to Article 3, "A criminal law that decriminalizes an act or reduces penalty for it shall have retroactive force. A criminal law that criminalizes an act or increases punishment for it shall not have retroactive force."

1 Dana S. 2009. Beyond retroactivity to realizing justice: A theory on the principle of legality in international criminal law. *Journal of Criminal Law and Criminology*. Vol. 99, N 4. 864-865; Pends D. O. 2010. Retroactive law and proactive justice: Debating crimes against humanity in Germany 1945-1950, *Central European History* 43, 428-63; Faure M., Goodwin M. and Weber F. 2013. The Regulator's Dilemma: Caught between the Need for Flexibility and the Demands of Foreseeability. *Reassessing the Lex Certa Principle*. Rotterdam Institute of Law and Economics, N 3, 44-46; Schaack B. V. 2008. *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*. The Georgetown Law Journal vol. 97. 121-122; Turava M. 2011. *General part of criminal law: teaching of crime*. Tbilisi, Meridiani. 109; Wessels I. and Beulke V. 2010. *General part of criminal law, crime and its composition*. Tbilisi, Tbilisi University. 18-22; Dubber M.D. and Hornle T. 2014. *Criminal law: A comparative approach*. Oxford, Oxford University press. 73.

2 Khubua G. 2004. *Theory of law*. Tbilisi, Meridiani. 146; Popple J. 1989. The right to protection from retroactive criminal law, *Criminal law journal*. Vol. 13. 255; Dubber M.D. 2010. *The Legality Principle in American and German Criminal Law: An Essay in Comparative Legal History*. 16.

3 Ashworth A. 2009. *Principles of Criminal Law*. New York, Oxford University Press. 59; Samaha J. 2011. *Criminal Law*. Belmont, Wadsworth Cengage Learning. 41-42; Adler D. J. T. 1987. Ex post facto limitations of changes in evidentiary law: repeal of accomplice corroboration requirements, *Florida law review*. 55. N 6. 1196-1197.

4 Packer H. L. 1968. *The limits of the criminal sanction*. California, Stanford University Press Stanford. 53

5 Determining the time of validity of the law is explained by the Constitutional Court by the importance of protecting legal security and principle of stability.

The prohibition of the retroactivity of the law ensures the stability of legislation, which is a requirement of free society.⁶ The guaranteeing function of criminal law is the manifestation of the legal system. To enable an addressee of the provision “to organize action”, a criminal law provision must also be sufficiently foreseeable.⁷ It is precisely the interaction of these two issues that is important for clarifying the question raised in this paper.

A controversial issue in legal literature is whether the prohibition of retroactivity should apply to judicial interpretation that broadens the definition of an offence or makes the penalty heavier than the earlier interpretation. The debate on this issue was triggered by heterogeneous court practice.

The debate concerns the clarification of the issue of who applies the provision – the “creator” of a new provision or the “discoverer” of the old one.⁸ It is believed that a court is not the creator of provision, as this conflicts with the principle of distribution of powers⁹ and is an exclusive authority of parliament,¹⁰ but rather it serves as the discoverer of an old provision which has been misinterpreted so far. Therefore, since an old provision was in force at the time an action was committed, the retroactive application of a new understanding of the provision to an old relationship must not be a problem.¹¹ This opinion was shared by many lawyers but nevertheless it did not solve the issue of the retroactive application of judicial interpretation that broadens the composition of offence as that approach also has many opponents and it is handled differently in the practice of national¹² and international courts¹³. According to widespread opinion, interpretation may be retroactive¹⁴ because the law does not change at this time, it continues to be valid¹⁵ and a person may be released of liability only on the grounds of a pardonable mistake.¹⁶ Some scholars, however, believe that the refusal to subject broad interpretation to the prohibition of retroactivity excessively weakens the guaranteeing function of the law.¹⁷

For the purposes of this paper, it is also important to briefly overview the *lex certa* requirement, which is yet another element of the guaranteeing function of criminal law and serves the aim of achieving¹⁸ the “maximal foreseeability” of the law.¹⁹ As it is well known, the law must be a “reliable

6 State v. Picotte No. 01-3063-CR. (May 16, 2003). 45.

7 Rawls J. A Theory of Justice. 1999. Cambridge, Massachusetts, Harvard University press. 209.

8 Dworkin R. 1999. 81; Gray J.C. 1921. *The Nature and Sources of the Law*. New York: The Columbia University press.) 93-94.

9 Dworkin R. 1999. 84; Scalia A. 1989. The Rule of Law as a Law of rules. *The University of Chicago Law Review* vol. 56, N 4. 1183.

10 Martina J. and Storey T. 2015. *Unlocking Criminal Law*. New York, Routledge. 11.

11 Gray J.C. 1921. *The Nature and Sources of the Law*. New York: The Columbia University press.) 99-100.

12 Rogers v. Tennessee, 532 U.S. 451 (2001); United States v. Shabani, 513 U.S. 10 (1994); compare: Marks v. United States 430 U.S. 188 (1977); James v. United States 366 U.S. 213 (1961). For analysis see: Morrison T. W. 2001. Fair warning and retroactive judicial expansion of federal criminal statutes. *South California law review*. Vol. 74. 458-460.

13 CR v United Kingdom N 48/1994/495/577 (1996) compare: Rio Prada v. Spain N 42750/09 (2013)

14 Gvenetadze N. and Turava M. 2005. Methodology of decision making on criminal cases. Tbilisi, Georgian Judges Association. 21.

15 Turava M. 2011.123.

16 Ibid.

17 Morrison T. W. 2001. 470.

18 Ashworth A. 2009. *Principles of Criminal Law*. New York, Oxford University Press. 58.

19 For more information on this issues, see: Gegelia T. 2016. Prohibition of uncertainty of the law in modern criminal justice. *Review of*

source²⁰ for citizens and it must not come to them as a surprise *post factum*.²¹ That a provision must explicitly formulate its content follows from the requirement of constitutional importance, according to which addressees of a provision must be aware of the prohibition in advance in order to be able to “plan an action”²² and establish compliance with the law²³ which, in turn, is a guarantor of their freedom. According to the explanation of both national²⁴ and international courts²⁵, a provision must be made clear by a court and therefore, an interpretation of a court has (or must have) a guaranteeing importance similar to that of the provision.

Thus, one should share the opinion of scholars who view such interpretations of courts as being tantamount to a change in the law and apply *ex post facto* restriction. According to a widespread opinion, the authors of which include J. Gray and H. Hart, a law is defined as it is viewed and interpreted by a court against current challenges and not as adopted decades ago by the parliament to meet the challenges of those times.²⁶ Consequently, if the understanding of the law changes today, it means that the law itself changes and, therefore, we should apply exactly the same standard towards a new, broader definition of offence, as it happens in the case of legislative amendments. A court must be a reliable source for understanding the law. Attitudes toward this issue differ in the practice of national courts in various countries. For example, US criminal law sets different approaches according to individual states. An interesting case in this regard is the decision of Supreme Court of Tennessee on the case *Roger v. Tennessee* in which a person was punished for a murder although a long period elapsed after the stabbing of the victim with the intention to kill and the death of the victim. According to the established practice, which dates back to the 13th century, medical science was not capable of determining the causality between the action and the outcome of the action beyond a reasonable doubt after a significant amount of time had elapsed following the action. Therefore, it was impermissible to blame the outcome on the person and qualify the action as a murder. According to the Supreme Court of Tennessee, the limitation of a murder by a year and a day rule was not defined by the law, it was a remnant of common law, no longer corresponded to modern achievements and did not deserve to be observed. The court defined the act as murder and punished the person for murder.²⁷ One of the judges, A. Scalia, disagreed with the court decision and called it a gross violation of the prohibition of retroactivity of the law. To the court’s assessment that the application of retroactivity to interpretation would impede the development of case

Constitutional Law. N10.

20 Gvenetadze N. and Turava M. 2005. 33.

21 Jeffries, J. C. Jr. 1985. Legality, Vagueness, and the Construction of Penal Statutes, *Virginia Law Review* vol. 71. 231.

22 On the importance of *ex post facto* prohibition, including in terms of certainty of provision, see: *Weaver v. Graham* :: 450 U.S. 24 (1981); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966); *City of Chicago v. Morales*, 527 U.S. 41, 58–59 (1999).

23 The Constitutional Court of Georgia also makes an interpretation similar to the importance of certainty of the law. See, decision N2/2/389 of 26 October 2007.

24 Decision of the Constitutional Court N1/2/552 of 4 March 2-15, para. 16-17.

25 *Ashlarba v. Georgia* N45554/08 (Strasbourg: 15 October 2014); *Kokkinakis v. Greece* N 14307/88 (Strasbourg: 25 May 1993); *Steel and others v. The United Kingdom* N 67/1997/851/1058, (Strasbourg: 23 September 1998); *Cantoni v. France* N17862/91 (Strasbourg: 11 November 1996); *Huhtamaki v. Finland*, N54468/09 (6 March 2012).

26 Gray J.C. 1921. 94; Hart H.L.A. 1982. *The Concept of Law*. Oxford, Clarendon Press. 137-138.

27 Kadish S.H., Schulhofer S.J. and Steiker C.S. 2007. *Criminal law and its process*. New York, Aspen, 150.

law, which is the foundation of the common court system, A. Scalia responded that the court was ignoring that such a change must be applied to new relationships alone, otherwise the fundamental principle of *lex praevia* would be violated.²⁸ Scalia's opinion was shared by the Supreme Court of Wisconsin which, although noting the outdated nature of a year and a day rule and its incompliance with modern technology, did not apply the new interpretation of the provision retroactively to the accused person on the grounds of the prohibition of retroactivity.²⁹ German criminal law disagrees with the application of the prohibition of retroactivity of the law to a court interpretation. German criminal law prohibited driving while under a degree of influence of alcohol or other toxic substance that deprived the driver of the capacity to drive safely. The absence of "the capacity to drive safely," however, was established by a court, based on several years of practice and expert evaluation, only in cases when at least 0.13% blood alcohol content was detected. Later, a German appeals court changed the standard, lowering the limit of blood alcohol content from 0.13% to 0.11%. In a new case, in which experts detected lower than 13% of alcohol content in the blood of a person, the court still convicted that person. In response to the complainant's argument — that the new approach should not be applied to him because it established a liability for an action which was not punishable at the time when it was committed — the court explained that the new interpretation was to be extended to this case because the law did not change and the letter of the law accommodated such interpretation of the provision, while *lex praevia* applied only to a new law that made the penalty heavier.³⁰

Under the influence of German criminal law, it is also not supported in Georgian legal literature or in common court practice, a position that was illustrated by an important interpretation of the Supreme Court of Georgia in 2012.³¹ According to the previous position of the Supreme Court,³² for a fraud committed over a long period of time to be qualified as a significant crime, ill-gotten wealth that exceeded the value of GEL 10 000 in total had to have belonged to one individual. If there were multiple victims, the crime would be judged by the rule of cumulative crimes. The previous approach, in the court's opinion led to an application of unfairly lenient sentences (because of the principle of absorption resulting in concurrent sentence) which would not be fair, therefore in the new case, the action of a group of persons was qualified as large-scale fraud regardless of the fact that the stolen property belonged to several people. Thus, with the new interpretation of the provision, the penalty for a crime against several people became stricter, although no one raised the issue of *lex praevia*. An interesting case in this regard is a case heard by the European Court of Human Rights, *Del Rio Prada*. The case concerned a court's interpretation of a law, which harmed the defendant. The previous interpretation, which was that two days of work in a prison meant the de-

28 Ibid. 152-153.

29 Ibid. 153.

30 Weigend T., eds. Heller K. J. and Dubber M.D. 2011. The handbook of comparative criminal law. Stanford law books. 256.

31 See 2015. Interpretation of provisions used in decisions of the Grand Chamber of the Supreme Court of Georgia – decision №236ap-12 of 22 November on the qualification of crime against private property – fraud in a large amount. Tbilisi. Supreme Court of Georgia. 141-145. Available at: <http://www.supremecourt.ge/files/upload-file/pdf/ganmarteba-d.pdf>. Last accessed on 10.30.2017.

32 Decision №1078ap of the Supreme Court of Georgia of 11 February 2008. See, in the collection of works – 2008. Decisions of the Supreme Court of Georgia on criminal cases, private part, №12. 46-49.

duction of one day from the imposed sentence (Parot Doctrine), was abolished by an accumulated sentence rule in relation to the imposed punishment. The original rule was a practice established by the interpretation of the provision by a court and clearly did not follow from the law. The applicant, who would have to serve nine years longer under the new interpretation, argued that the new interpretation violated the principle of the prohibition of retroactivity; the European Court agreed and ruled it as an ex post facto violation.

This judgment by the European Court of Human Rights must be applied in Georgia, as well, for two reasons: it is the interpretation of Article 7 of the Convention on Human Rights and it is the most recent court decision on the issue. The Court's explanation is very important to understand the content of the law, which has been repeatedly emphasized by the European Court of Human Rights³³ and the Constitutional Court of Georgia.³⁴ Consequently, if a court interprets the definition more broadly than it has in the past, its definition of a provision of the law and retroactively applying that new understanding would be in violation of the provision's addressee's right to advance warning.

33 *Cantoni v France* N 17862/91 (1996); *Ashlarbav. Georgia* N 45554/08 (2014).

34 Decision of the Constitutional Court N1/2/552 of 4 March 2-15, para. 16.