

The retroactive force of criminal laws in the system of general principles for their action in time

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Abstract. This article is dedicated to topical aspects of applying the principle of the retroactive force of the criminal laws of Republic of Kazakhstan. On the strength of the study of views held by different scientists and comparative analysis of the practice of applying the criminal code, the author puts forth recommendations and suggestions on streamlining existing legislation. Amid the adoption of new criminal legislation, the criminal-legal institute under study takes on special significance in the system of norms of the General and Special parts of the Criminal Code. [Zholumbayev M., Nurmukhanbet D., Zhumabayeva K., Satybaldi L., Seisembayeva G., Tleuberdina U., Mussipova D. **The retroactive force of criminal laws in the system of general principles for their action in time.** *Life Sci J* 2014;11(5s):311-315] (ISSN:1097-8135). <http://www.lifesciencesite.com>. 62

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Introduction

The discussion of the country's draft Criminal Code, slated, as scheduled in the legislative plan, to be brought into effect on July 1, 2014, continues in Kazakhstan. The coming into effect of a new criminal law inevitably brings up a number of questions related to its action in time – more specifically, its retroactive force.

In legal literature, it has been justly maintained that issues related to the temporal action of criminal laws and their retroactive force are the most critical and are characterized by peculiarities traceable in no other branches of law. It is for this reason that the retroactive force of laws has for many years had the attention of jurists and consequently turned into a central issue with the action of laws in time being contradistinguished to the immediate action of new laws and survival of old ones [1].

Describing long-lasting legal relations, French lawyer Ripert noted that “they are held up by a sturdy reinforcement of the old law. Let them repeal it, and then we must determine what has been destroyed and what can still live on under the rule of the new law” [2]. These words can be well applied to the area of criminal law, where the repeal of a law does not mean its legal “untenability”, since it continues to be applied as the law of the time the crime was committed. In criminal-legal doctrine, such a way for the “longevity” of a criminal law that lost its effect is called the ultra-active operating principle of a criminal law in time. Roubier called it the survival of the old law [3].

The ultra-activeness principle normally applies when the new criminal law (its particular articles) that has come into effect is, compared with the old law, either equivalent to or stricter than the old one. However, in cases when the new law is

milder compared with the old one, there “comes into action” the principle of the retroactive force of criminal laws, which is enshrined in Part 1 of Article 5 of the Criminal Code of the Republic of Kazakhstan.

In theory, the retroactive force is construed as the across-the-board applicability of laws in respect of all those cases of life and public relations which took place prior to their coming into effect [4].

Chapter 1. A general characterization of the principle of the retroactive force of criminal laws

In Kazakhstan, the rules for the retroactive action of laws in time are enshrined in Sub-item 5 of Item 3 of Article 77 of the Constitution of the Republic of Kazakhstan. According to the given norm of the Primary Law, “Laws that establish or augment responsibility, impose new obligations on citizens or aggravate their status do not have retroactive force. If after the commitment of the offense one's liability for it is mitigated, the new law is applied”.

The prescriptions of Sub-item 5 of Item 3 of Article 77 of the Constitution of the Republic of Kazakhstan apply in full to provisions of the Criminal Code of the Republic of Kazakhstan. Consequently, the new criminal law can have retroactive force on condition that, compared with legislation that was in place before, it substantially alleviates the “legal fate” of the person who committed the crime. There follows from this a general definitive conclusion: the retroactive force of criminal laws is the application of provisions of new, milder, criminal laws in respect of persons who committed crimes prior to their coming into effect.

According to Part 1 of Article 5 of the Criminal Code of the Republic of Kazakhstan, a

milder law is to be construed as a law which eliminates the criminality or punishability of a given act and which mitigates liability or punishment for it, or which otherwise improves the status of a person who committed it.

As for the ways of vesting laws with retrospective force, according to prominent commentator on the Criminal Code of Germany K. Lackner, a law can reach back into the past via a direct arrangement made in the law itself or a special act on bringing it into effect, as well as implicitly, when the retroactivity of a law (with no special arrangement made on that) follows from its purport [5]. A direct arrangement, according to A.I. Boitsov, can, in turn, have the following form: a) a clearly put verbal instruction on that; b) the across-the-board applicability of its action in respect of legal relations “irrespective of the time of their occurrence”, and c) the establishment of the term of bringing the law in effect earlier than it was passed [6].

Item 3 of the decree of the Constitutional Council dated March 10, 1999, states: “Laws passed by the Parliament can act with retroactive force if the decision on that is enshrined in the law itself or a decree on bringing it into effect”. Consequently, the Kazakh legislator has elected to preserve just one – direct – way of vesting laws with retroactive force.

There are two varieties of the retroactive force of laws in the theory of criminal law: simple and revisional. The simple retroactive force applies when a new, milder, law applies its action in respect of crimes for which the sentence of a court has not come into legal effect yet. Note that there are two possible ways of resolving the issue. In the event if the new criminal law eliminates the punishability of the act (decriminalization), all criminal cases opened in respect of these acts are subject to dismissal. Whereas if the criminal law only mitigates the punishment or otherwise improves the status of the person who committed the crime, the investigative authority serves charges on the person and the court renders a sentence and awards a punishment in accordance with the criminal law.

The essence of the revisional retroactive force lies in that the new, milder, criminal law also applies its action to crimes for which the sentence of the court has already come into effect. There are cases when a sentence that was awarded and brought into force is carried out and the person starts serving the sentence or has already finished serving it but has an outstanding conviction. Such criminal cases are subject to re-examination, and sentences awarded are subject to “revision”.

Note that there are two possible ways of resolving the issue. If the new criminal law decriminalizes the act, persons serving the sentence

are released from serving it further and come to be considered unconvicted starting from the moment the new law comes into effect. Whereas if the new criminal law only mitigates the punishment, this punishment is subject to reduction to an extent prescribed by the new law. Note that measures of punishment in respect of persons who were convicted based on the law that was in effect before and have not yet served their sentence are to be brought in line with the new law in those cases when the punishment awarded through it is stricter than is established by the upper limit of the sanction of the corresponding article of the newly instated criminal law.

Thus, the new, milder, criminal law is applied to persons:

- 1) who are under examination;
- 2) in respect of which the case is in court;
- 3) who are serving a sentence;
- 4) who have already finished serving a sentence but have a conviction.

Chapter 2. Issues in the application of the retroactiveness of criminal laws

In criminal-legal literature, there is a highly popular view on that the retroactive force is vested to not the newly passed law but the one that has come into effect; prior to the coming into effect of a legal act that has, albeit, been passed, the old law remains in force [7].

This stance, which has gained foothold in law-enforcement practice as well, is, in our view, outmoded and quite vulnerable to criticism. The thing is, as we have established above, that a considerable amount of time often passes between the moment the new Criminal Code is adopted and the day it is actually applied (for instance, the criminal codes of Kazakhstan and the Russian Federation were brought in effect 5 months following ratification). Note that this concerns not only laws that have no retroactive force but those that do. At the same time, vesting milder laws with retroactive force starting from the moment they are brought into effect would, in our view, be unfair, since subjecting a person to criminal repression, if it has already been cancelled out or mitigated through new laws is, as we believe, unacceptable. Thus, for instance, there once was quite a contradictory situation in Russian legislative practice in this regard [8].

The Federal Law of the Russian Federation “On Bringing into Effect the Criminal Code of the Russian Federation” was officially published in the “Rossiyskaya Gazeta” (“Russian Newspaper”) on June 18, 1996. This law prescribed dismissing all opened criminal cases dealing with acts not recognized as crimes by the new Criminal Code of the RF, which, in accordance with the same law, was

going to be brought into effect starting on January 1, 1997. In their letters sent to law-enforcement authorities soon after the Federal Law had been published, complaining citizens demanded that all criminal cases dealing with components decriminalized by the Criminal Code of the RF be immediately dismissed. Some criminal cases were indeed dismissed. The reason behind this was the absence in the “introducing” law itself of allusions to the date of its coming into effect. In the meantime, pursuant to the then-in-effect Federal Law “On the Procedure for Promulgating and Bringing into Effect Federal Constitutional Laws, Federal Laws, and Acts by the Chambers of the Federal Assembly” dated July 14, 1994, Federal laws (if there was no other procedure in place) were to come into effect upon the expiry of 10 days after their being officially promulgated. Thus, the law on bringing the Criminal Code of the RF into effect was to come into effect starting already on July 29, 1997, and it was from this date one was supposed to start, as citizens demanded, dismissing cases dealing with components decriminalized by the Criminal Code of the RF.

However, the Russian legislator chose to resolve the issue in a different way. Thus, on December 27, 1996, the State Duma of the Federal Assembly passed a law on making changes and amendments to the law “On Bringing into Effect the Criminal Code of the Russian Federation”. The changes made had the following gist. The legislator suggested the executor of law “forgetting” the former formulation of the Federal Law promulgated on June 18, 1996 and started putting in practice its provisions concurrently with bringing into effect the Criminal Code of the RF – i.e. starting not from July 29, 1996, but January 1, 1997. The attempt by the legislator to clear the collisions that had arisen led to even a greater mess and legal chaos. Some law-enforcement agencies started reopening dismissed cases and concurrently dismissing them again, but now as of January 1997, as was required by the Federal Law.

Thus, this “blunder” by the Russian legislator did not, of course, add weight to its prestige and, what is more, inflicted great damage on the rights of citizens, in whose respect criminal cases that were subject to dismissal continued to be opened.

A year later, the Russian scenario was “played out” in an exactly the same way by the Kazakh legislator as well. The national law “On Bringing into Effect the Criminal Code of the Republic of Kazakhstan” was published in the Parliament’s Gazette on July 16, 1997. In similarity to the Russian analogue, it contained no instructions on the date of coming into effect and, therefore, was supposed to commence its action by way of a regular procedure that is starting from July 27, 1997.

However, in practice everything went differently. All the prescriptions of the “introducing” law, including those on dismissing criminal cases dealing with components decriminalized by the Criminal Code of the Republic of Kazakhstan, were fulfilled only with the new Criminal Code coming into effect that is upon the expiry of 5 months following its ratification.

Thus, the above situation raises the question: Is applying a law that has retroactive force starting only from the moment it was brought into effect well-reasoned? The answer to this question can be given based on the following considerations.

There is no doubt the state cannot demand that its citizens observe a law that has been passed but has not been brought into effect yet. However, it cannot, in our view, procrastinate in observing a milder law that, consequently, has retroactive force. We find it unfair to subject a person to criminal repression for 5 more months, when at the time the new criminal law (the Criminal Code of the Republic of Kazakhstan) is passed it has already been established that the act committed by the person is no longer considered criminal.

To summarize the above inferences, we find it expedient to advise legislative authorities of the need for streamlining existing legislation. By way of discussion, we suggest entering the following addition into Item 4 of Article 36 of the Law of the Republic of Kazakhstan “On Regulatory Legal Acts”: a regulatory legal act possessing retroactive force shall be brought into effect and shall be subject to application starting from the day it was officially promulgated. We suggest formulating the full official text of Item 4 of Article 36 in the following way: “4. A regulatory legal act that mandates juridical liability for actions that did not entail such liability before or establishes stricter liability compared with the former cannot be brought into effect until the expiry of the 10-day term following the official promulgation of this act. A regulatory legal act that dismisses juridical liability for actions that entailed such liability before or establishes milder liability compared with the former shall be brought into effect starting from the moment this act was officially promulgated”.

We believe it expedient to complement Part 1 of Article 5 of the draft Criminal Code of the Republic of Kazakhstan the same way as well: “A criminal law possessing retroactive force shall be brought into effect and shall be subject to application starting from the day of its official promulgation”. We believe that it is an approach of this kind that should be regarded as the fairest in terms of real humanism.

Part 2 of Article 5 of the Criminal Code of the Republic of Kazakhstan states: “If a new criminal law mitigates the punishability of an act for which a

person is serving a sentence, the awarded punishment shall be subject to reduction within the boundaries of the sanction of the newly passed criminal law". This formulation of Part 2 of Article 5 of the Criminal Code of the Republic of Kazakhstan is, in our view, not quite sound. The thing is that only a supervisory-instance court can (considering all the circumstances of the case) change a punishment "within the boundaries of the sanction" of the new criminal law on a court's sentence that has come into effect. Whereas the second part of Article 5 of the Criminal Code of the Republic of Kazakhstan deals with cases when a sentence that has come into effect gets re-examined by the court that awarded that sentence or by the court of the place of imprisonment by way of a procedure for bringing it in line with the new criminal law. Note that we mean only those cases when the sentence imposed by the court is stricter than is established by the upper limit of the sanction of the corresponding article of the new criminal law. We find the wording of Article 13 of the Criminal Code of the Republic of Tajikistan more preferable: "If the new criminal code mitigates the punishability of the act for which the person is serving a sentence, the imposed sentence shall be subject to reduction in accordance with the upper limit of the sanction of the newly passed criminal law" [9].

Thus, based on the above, we find it more expedient to change the legislative formulation of Part 2 of Article 5 of the Criminal Code of the Republic of Kazakhstan and formulate it in the following form:

"2. If the new criminal law mitigates the punishability of the act for which the person is serving the sentence, the imposed sentence shall be subject to reduction in the event when it transcends the upper limit of the sanction of the newly passed law. Furthermore, the punishment established by the court before shall be mitigated to the upper limit of the sanction of the new criminal law".

Conclusion

In present-day conditions, when criminal legislation undergoes frequent changes, temporal collisions, i.e. collisions of norms of law acting at different times, are the most complex in terms of both the content and ways of overcoming them in the process of law-enforcement activity. One must give credit to the legislator: the Criminal Code of the Republic of Kazakhstan has the best developed, compared with any other sectoral codified statutory act, system of temporal collision norms, by means of which, in qualifying crimes committed, the executor of law can and ought to overcome collisions arising between criminal laws acting at different times.

At the same time, it is in criminal law that temporal collisions can sometimes be really severe. Executors of law at all levels have the greatest trouble applying the retroactive force of criminal laws.

The practice of refusal by the legislator to vest milder laws with retroactive force carries on in modern developed countries as well: thus, for instance, in the Federal Republic of Germany there have been numerous trials in respect of citizens of the former German Democratic Republic, who conducted their activities in strict accordance with legislation that was in force at that time, and in Latvia over 100 former employees of the NKVD, MGB, and KGB, party, state, public figures, and law-enforcement officers were brought to trial in conjunction with the execution of their official duties during the Soviet period [10].

This practice has been found to violate the primary inalienable rights and freedoms of man in modern international law (Article 15 of the 1966 International Covenant on Civil and Political Rights; Article 11 of the 1948 Universal Declaration of Human Rights). At the same time, international legal acts do not restrict the ability of states to vest with retroactive force laws that establish criminal liability for acts that at the time of getting committed were considered a criminal offence in accordance with general principles of law recognized by the international community.

Inferences

Based on the above arguments, the author puts forth the following inferences on this work:

1. Bringing the rule on the retroactive action of a law up to the level of a constitutional principle indicates that the Kazakh legislator imparts juridical significance to this principle.

2. One should stipulate the date of the coming into force of the new Criminal Code of the Republic of Kazakhstan in the law on bringing it into force, inclusive of the principle of retroactivity of provisions of the milder criminal law.

3. One should complement Part 1 of Article 5 of the Criminal Code of the Republic of Kazakhstan with a norm having the following content: "A criminal law that has retroactive force shall be brought into effect and shall be subject to application starting from the day on which it was officially promulgated".

4. With a view to working out uniform law-enforcement practice, one should formulate Part 2 of Article 5 of the Criminal Code of the Republic of Kazakhstan in the following form:

"2. If the new criminal law mitigates the punishability of the act for which the person is

serving a sentence, the imposed sentence shall be subject to reduction in the event it when transcends the upper limit of the sanction of the newly passed law. Note that punishment established by the court earlier is mitigated to the upper limit of the new criminal law”.

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