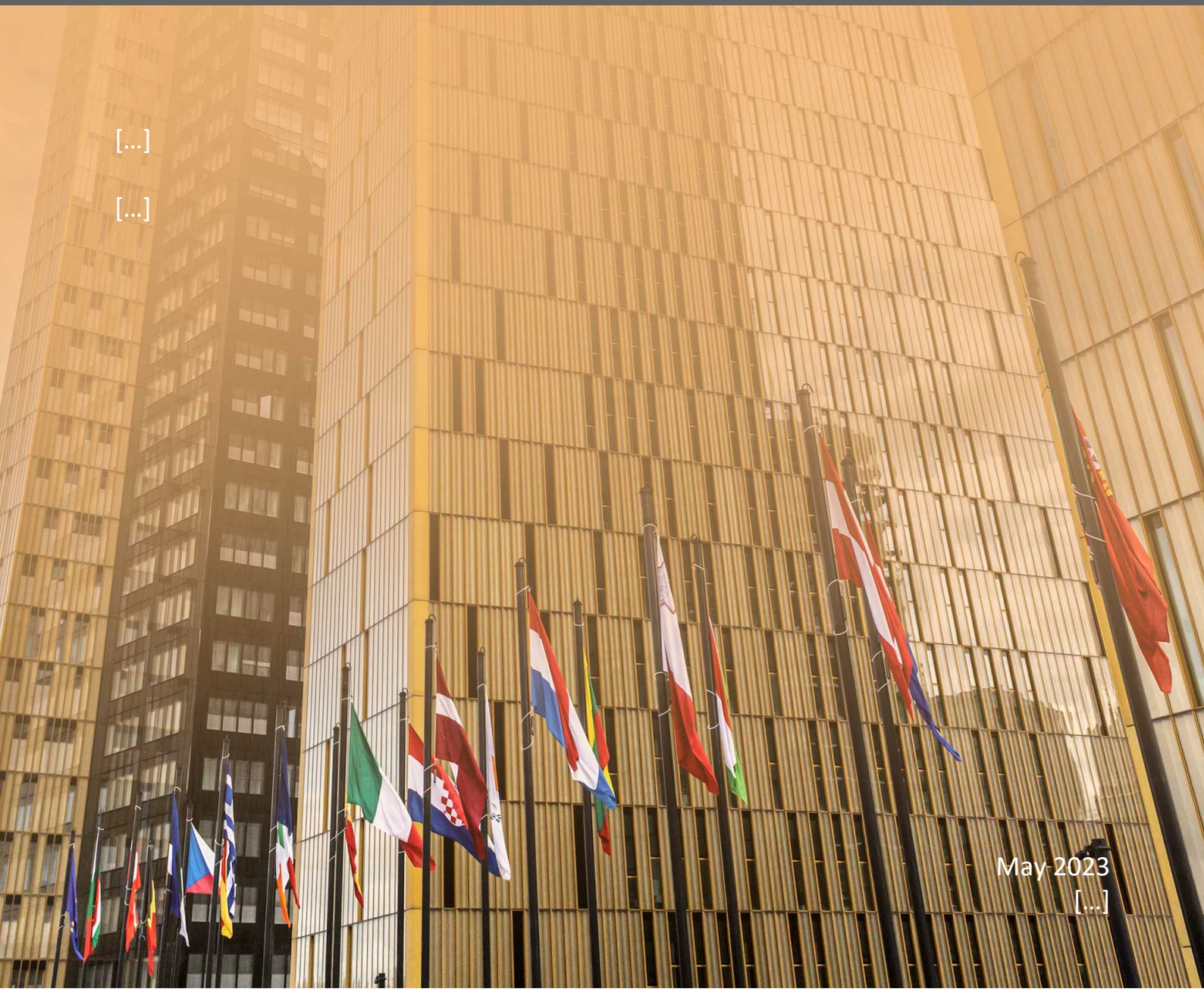
COURT OF JUSTICE
OF THE EUROPEAN UNION

EN

RESEARCH NOTE

RESEARCH AND DOCUMENTATION DIRECTORATE

Applicability of the principle of the retroactivity of the more lenient criminal law (*lex mitior*) to final criminal convictions and the effects of the invalidation of criminal provisions on the application of that principle



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May 2023

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INTRODUCTION

1. The Research and Documentation Directorate (RDD) has received a request for a research note on the application of the principle of the retroactivity of the more lenient criminal law (*lex mitior*) to final convictions entailing custodial sentences currently being enforced in Member States.

2. More specifically, this research note aims to provide a response to the following two questions:

   a) Does the *lex mitior* principle apply to final criminal convictions, in particular final custodial sentences currently being enforced, regardless of any express legislative provision to that effect (amnesty law)?

   b) What conditions trigger the *lex mitior* principle, and, in particular, is constitutional case-law which has invalidated a national criminal provision to be regarded as a more lenient criminal law ('*lex*'), capable of leading to the application of *lex mitior*, or, on any view, is subsequent legislative intervention required to make criminal provisions more lenient?

3. To that end, the current research covers the laws of **thirteen** Member States, namely **Belgium, Bulgaria, France, Germany, Greece, Ireland, Italy, Lithuania,** the **Netherlands, Poland, Portugal, Spain** and **Sweden.** [1]

4. In order to gain a clearer picture of the approaches taken in national systems, it is necessary, first of all, to make some preliminary observations on the scope of the *lex mitior* principle in the legal systems examined (**I**). Analysis will then focus on the applicability of the *lex mitior* principle to final criminal convictions (**II**). Lastly, the application of that principle in the event of a change *in bonis* in the case-law will be addressed (**III**), as will the effects of the invalidation of criminal provisions on the application of rules more favourable to convicted persons (**IV**).

I. PRELIMINARY OBSERVATIONS ON THE SCOPE OF THE *LEX MITIOR* PRINCIPLE IN NATIONAL LEGAL SYSTEMS

The principle of the retroactive application of the more lenient criminal law ('*lex mitior* principle', also referred to as '*lex mitior retro agit*' or 'principle of retroactivity *in mitius*') is an essential principle of criminal law in the vast majority of the Member States studied. In some cases, that principle is even enshrined in the Constitution (**Portugal**), [2] elevated to the rank of a fundamental constitutional value (**France**) [3] or given some constitutional basis (**Italy** [4] and **Spain** [5]), to be subsequently fleshed out by criminal law.

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2 Article 29(4) of the Portuguese Constitution.

3 In **France**, retroactivity *in mitius* has been elevated to the rank of constitutional value by the Conseil constitutionnel (Constitutional Council, France) (see Conseil constitutionnel judgment No 80-127 DC of 19 and 20 January 1981) based on the principle that sentences must be strictly necessary as provided for under Article 8 of the Declaration of the Rights of Man and of the Citizen of 1789. See also Genevois, B., Les contraintes d'ordre constitutionnel pesant sur l'entrée en vigueur de la loi, *Mélanges en l'honneur de Pierre Avril*, Montchrestien, 2001, p. 243.

4 In **Italy**, that basis has been identified in the principle of equality, which, as a general rule, requires equal punishment for the same acts, regardless of whether the acts were committed before or after the entry into force of the law providing for *abolitio criminis* or the amendment making the law more lenient (see, in that respect, judgment of the Corte costituzionale (Constitutional Court), No 394 (2006)).

5. In other cases, that principle does not have constitutional status but rather originates in the Criminal Code (**Belgium**, **Bulgaria**, **Germany**, **Greece**, **Lithuania**, the **Netherlands**, **Poland** and **Sweden**) and the conditions for its application are therefore often detailed in criminal procedural provisions.

6. The rationale behind the *lex mitior* principle proceeds from the application of criminal law over time. In general, the application of *lex mitior* is seen as an exception to the principle of non-retroactivity of criminal law. However, its application may meet different requirements in different legal systems.

7. By way of example, in **France**, such an exception is regarded as reflecting an intention to grant clemency on the part of the legislature, which, by adopting a more lenient law, considers the criminalisation and/or sentencing under the previous law no longer necessary. In **Spain**, the *lex mitior* principle meets a supreme requirement of justice recognised by the Constitution. The adoption of a more lenient law means that an earlier, harsher sentence is now socially unnecessary and unfair. [6] Similarly, in **Poland**, the operation of the *lex mitior* principle is based on the presumption that the more recent law is more in line with current social needs and axiological preferences than the earlier law. [7]

8. In **Bulgaria**, in accordance with the principle of the legality of offences and penalties, no retroactive effect is conferred on provisions of criminal law. However, the *lex mitior* principle is also recognised as an exception in Bulgaria.

9. In **Italy**, the Corte costituzionale (Constitutional Court) has held that the *lex mitior* principle has a different value to the principle of the non-retroactivity of criminal law. While the latter principle is essential for protecting individuals from arbitrariness on the part of the legislature because it means they can foresee the legal consequences of their behaviour, the *lex mitior* principle is unrelated to the freedom of individual self-determination. [8]

10. Finally, in some of the Member States considered (**Belgium**, **Lithuania** and **Portugal**) the *lex mitior* principle tends to be seen as a *sui generis* general principle of criminal law. Thus, in the **Portuguese** legal system, it is accepted that the idea of a minimal restriction on the right to personal freedom could, in itself, justify the mandatory application of the more favourable criminal law. That idea also appears to be inherent in the **Lithuanian** legal system. Similarly, in the **Belgian** legal system, the *lex mitior* principle is regarded in the case-law as a general principle

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5 In **Spain**, Article 25(1) of the Constitution recognises only the principle of legality – or non-retroactivity of criminal law – in the title on fundamental rights and public freedoms. In the absence of express recognition, the principle that the more lenient law has retroactive effect can be inferred *a contrario sensu* from Article 9(3) of the Constitution. The article, which is merely aspirational in nature, provides that the Constitution 'guarantees the principle of legality, the hierarchy of rules, the public nature of rules, the non-retroactivity of provisions that are not favourable to or that restrict individual rights, legal certainty, liability and the prohibition on arbitrariness on the part of the public authorities' (see, in that regard, judgment No 8/1981 of the Tribunal Constitucional (Constitutional Court) of 30 March 1981).

6 Judgment of the Tribunal Supremo (Supreme Court, Spain) No 4848/2022 of 21 December 2022.

7 Judgment of the Sąd Najwyższy (Supreme Court, Poland) of 12 May 2021, II KK 47/21.

8 Judgment of the Corte costituzionale (Constitutional Court, Italy) No 394 (2006).

of law [9] that should be applicable in any scenario that could help improve the accused's position. [10]

II. APPLICABILITY OF THE *LEX MITIOR* PRINCIPLE TO FINAL CRIMINAL CONVICTIONS

11. Of the Member States examined, **Ireland** is the only State where the *lex mitior* principle is not recognised (**A**).

12. **All the other** Member States examined endorse the *lex mitior* principle in their respective legal systems. Those States can be divided into two broad groups.

13. The first group comprises Member States in which final criminal convictions are, in principle, excluded from the scope of the *lex mitior* principle (**Belgium**, **Bulgaria**, **France**, **Germany**, the **Netherlands**, **Greece**, **Italy** and **Sweden**) (**B**).

14. The second group consists of Member States whose legislation expressly allows the application of the *lex mitior* principle to final criminal convictions (**Lithuania**, **Poland**, **Portugal** and **Spain**) (**C**).

A. NON-RECOGNITION OF THE *LEX MITIOR* PRINCIPLE

15. Of the legal systems considered, the **Irish** legal system is the only one that does not recognise the *lex mitior* principle. Irish legislation provides that if a law repeals an earlier law in full or in part, unless a contrary intention is evident in the repealing law, the repeal has no effect on criminal penalties imposed under the repealed law. Furthermore, repeal is without prejudice to pending criminal proceedings relating to such an offence. [11] It is therefore permissible to initiate criminal proceedings and impose criminal penalties as if the earlier law were still in force.

16. It should be noted, however, that the question of the future recognition of the *lex mitior* principle in Irish law remains open, with academic lawyers providing some interesting pointers in that regard. [12] The fact remains, however, that this is a purely theoretical development for the time being and that the principle is not currently recognised, either by the legislature or the case-law.

17. That said, it is also important to point out that Irish case-law has, for all practical purposes, recognised the existence of a principle whereby the sentence imposed on the accused must not be more severe than that applicable when the offence was committed. [13]

B. LEGAL SYSTEMS THAT PRECLUDE THE APPLICATION OF THE *LEX MITIOR* PRINCIPLE TO FINAL CRIMINAL CONVICTIONS

18. This study shows that **eight** of the legal systems considered (**Belgian, Bulgarian, Dutch, French, German, Greek, Italian** and **Swedish**) have a general rule that the *lex mitior* principle does not

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[9] On the principle of 'the application of the more lenient criminal law' as a general principle of law, see judgment No 97/2012 of the Cour constitutionnelle (Constitutional Court, Belgium) of 19 July 1992, B.9, and judgment of the Cour de cassation (Court of Cassation, Belgium) RG S.03.0061.F of 14 March 2005; for detailed discussion and in-depth analysis, see Vancoppernolle, T., *Intertemporreel recht*, Brussels, Intersentia, 2019, inter alia, Nos 47 and 221 et seq.

[10] That finding follows from the judgment of the Cour de cassation (Court of Cassation, Belgium) of 17 November 1993 (Cass. RG 417, Arr.Cass. 1993, No 466). In that regard, see also paragraph 27.

[11] See sections 27 and 28 of the Interpretation Act 2005.

[12] Codifying the law on sexual offences: challenges and opportunities – Tom O'Malley BL.

[13] Thomas Enright *v.* Ireland and the Attorney General, High Court, unreported, 2001/18359P.

apply to final criminal convictions. However, in most of those legal systems, the application of that rule is qualified and subject to reservations.

19. In **French** law, the retroactive effect of the more lenient criminal law applies only to convictions that are not final when the new law comes into force. [14] This naturally implies that the *lex mitior* principle does not apply to final criminal convictions which are *res judicata*.

20. That rule is enshrined in the national case-law. In that regard, the Cour de cassation (Court of Cassation, France) has clarified that, except in the case of decriminalisation (*abolitio criminis*), [15] a new criminal law, even if less severe, has no effect on the sentences imposed by a judgment that is *res judicata* before the new law comes into force. [16]

21. French academic lawyers consider that the approach adopted by the legislature ensures compliance with the principles of legal certainty [17] and *res judicata*. A new criminal law requiring the courts to review all previous judgments could cause considerable legal confusion, calling those two principles into question. On this point, some writers conclude that application of the principle of retroactivity *in mitius* is consistent with the principle of the separation of legislative and judicial powers. [18] In principle, that retroactivity is limited to substantive criminal law alone. [19]

22. The **Italian** and **Greek** legal systems for their part make a clear distinction between two mechanisms, namely *abolitio criminis* and *abrogatio sine abolitio*.

23. In **Italy**, under the *criminal abolitio* mechanism, no one may be penalised for an act that no longer qualifies as an offence under a subsequent law. In other words, if a subsequent law (or any situation that produces similar effects such as a finding that a law is unconstitutional) renders lawful an act that previously constituted an offence, the subsequent law applies retroactively, potentially setting aside a criminal judgment that is *res judicata*. On the other hand, under the mechanism of *abrogatio sine abolitio*, the later, more lenient, law applies retroactively unless a final judgment has been handed down. [20]

24. In **Greece**, according to the provisions of the Criminal Code [21] as interpreted by the recent case-law of the Areios Pagos (Court of Cassation), the *lex mitior* principle does not apply to final criminal convictions unless the subsequent law decriminalises an act, in other words, states that

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[14] See the third paragraph of Article 112-1 of the French Criminal Code.

[15] The second paragraph of Article 112-4 of the French Criminal Code provides that a sentence ceases to be enforceable when it is imposed for an act which, under a law subsequent to the judgment, is no longer a criminal offence.

[16] See, to that effect, judgment of the Criminal Chamber of the Cour de cassation Crim of 22 May 1995, No 94-83.601, Bull. crim. No 183.

[17] Moumouni, I. 'Le principe de la rétroactivité des lois pénales plus douces: une rupture de l'égalité devant la loi entre délinquants ?', *Revue internationale de droit pénal* 2012, vol. 83.

[18] Desportes, V.F. and Le Guenehec, F., Droit pénale général, Economica, 2009, 16th ed., Paris. p. 297.

[19] Therefore, the immediate application of a procedural criminal law has no effect on acts properly carried out or judgments properly handed down under the law applicable at that time. See, to that effect, judgment of the Criminal Chamber of the Cour de cassation, Crim, of 17 March 1993, No 93-81.040 P.

[20] See, respectively, Article 2(2) and (4) of the Codice penale (Italian Criminal Code).

[21] Article 2(1) of the Greek Criminal Code provides that, if several legal provisions were in force between the commission of the criminal act and its final judgment, the one which results in the most favourable treatment for the accused in each specific case will apply. Article 2(2) provides that if, during enforcement of the sentence, a law subsequent to the final judgment states that an act no longer constitutes a criminal offence, enforcement of the sentence imposed will be suspended and its criminal consequences will cease.

an act no longer constitutes a criminal offence. [22] Thus, application of the *lex mitior* principle does not extend to cases where the sole effect of a law subsequent to the criminal conviction is to reduce the sentence or relax the conditions under which an act is deemed to constitute an offence.

25. It should be noted, however, that the Areios Pagos has handed down contradictory judgments in that regard for some time. In some judgments, in fact, the court has held that the principle of *lex mitior* does not apply at the sentence enforcement stage and that its main purpose is to ensure compliance with the principles of *res judicata* and legal certainty, [23] while in other judgments it has ruled that the principle applies even after the final judgment has been handed down in a case and before enforcement of the sentence has been completed. [24] Lastly, in a judgment handed down in 2021, the assembly of the Court of Cassation gave an answer resolving the conflict in the case-law along the lines set out in the preceding paragraph. [25]

26. Under **Bulgarian** law, the scope of the *lex mitior* principle [26] is defined as meaning that, where criminal proceedings end in a final conviction, the State's right to convict the perpetrator of the criminal offence is considered fully exercised and a review cannot be sought on the sole basis that a new law has entered into force. [27] A review of the final judgment solely on that basis would run counter to the requirement of stability for judicial acts.

27. Similarly, under **Belgian** law, once the criminal ruling has become irrevocable, the sentence imposed can be enforced, even if the criminal law has become more lenient since the final judgment imposing the sentence. [28] The more lenient criminal law applies even to acts committed entirely before it comes into force, but only in so far as no final judgment has as yet been handed down because the previous law continues to apply if the perpetrator has received a final conviction. Retroactivity applies to rules regarding both criminalisation (abolition of criminality or reduced scope of criminalisation) and on sentencing, with the exception of the provisions on criminal procedure.

28. Under **Dutch** law, the *lex mitior* principle [29] also does not apply to final criminal convictions – without prejudice to any express legislative provision in that regard (amnesty or pardon law) –

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[22] Χαραλαμπάκης Α. (επιμ.), *Ο νέος Ποινικός Κώδικας (Ερμηνεία κατ' άρθρο του Ν 4619/2019 – Τόμος Πρώτος (άρθρα 1-234)*, Νομική Βιβλιοθήκη, 2020, pp. 24 and 34.

[23] See ΑΠ (Ποιν.) (Court of Cassation, Criminal Division) 933/2020, apofasi tis 03.8.2020; ΑΠ (Ποιν.) (Court of Cassation, Criminal Division) 13/2021, apofasi tis 13.1.2021, available on Nomos.

[24] See Α01Π (Ποιν.) (Court of Cassation, Criminal Division) 1729/2019, apofasi tis 06.11.2019; ΑΠ (Ποιν.) (Court of Cassation, Criminal Division) 929/2020, apofasi tis 03.8.2020; ΑΠ (Ποιν.) (Court of Cassation, Criminal Division) 928/2020, apofasi tis 03.8.2020; ΑΠ (Ποιν.) (Court of Cassation, Criminal Division) 24/2021, apofasi tis 15.1.2021, available on Nomos.

[25] ΑΠ (ΟΛΟΜ-Ποιν.) (Court of Cassation, assembly of criminal court judges) 4/2021, apofasi tis 12.5.2021, available on Nomos.

[26] In Bulgaria, the *lex mitior* principle is enshrined in Article 2(2) of the Nakazatelen kodeks (Bulgarian Criminal Code) of 1 May 1968, published in Bulgarian Official Gazette (Darzhaven vestnik) No 26 of 2 April 1968.

[27] In that regard, see judgment No 394 of 19 May 2004 of the Second Criminal Chamber of the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria), Criminal Case No 1025/2003.

[28] See, in particular, judgments of the Cour constitutionnelle (Constitutional Court, Belgium) of 6 July 2017, No 91/2017, B.6, NjW 2017, 538, note Royer, S., 'Retroactieve toepassing van de mildere strafwet', paragraph B.6, and of 21 November 2013, No 160/2013, paragraph B.10.1. For a detailed overview, see Vancoppernolle, T., *Intertemporreel recht*, Brussels, Intersentia, 2019, Nos 47, 224, 235 and 238.

[29] In the Netherlands, the *lex mitior* principle is referred to in Article 1(2) of the Wetboek van Strafrecht (Netherlands Criminal Code). Moreover, under Article 94 of the Dutch Constitution, all Dutch courts are required to review breaches of Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); see, for example, judgment of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 15 June 2021, ECLI:NL:HR:2021:850, NJ 2021, 298, paragraphs 6.3 and 6.4.1.

and is limited to pending prosecutions. [30] The adoption of a more lenient criminal provision through a change in the legislation does not, as such, allow for review of a final criminal conviction. [31]

29. It should be noted that, in the **Netherlands**, the *lex mitior* principle may be applied by way of an exceptional review procedure in an appeal in cassation instituted 'in the interests of the law'. [32] [33] However, as a general rule, the setting-aside of a judgment following such an appeal has no bearing on the legal situation of the parties affected by the judgment, as the proceedings in that event relate only to a point of law raised in numerous cases and on which divergent views exist. [34]

30. **Swedish** law also recognises the concept of exceptional review (known as 'resning'), although it is different in nature. 'Resning' is the only way of tempering the finality of criminal convictions, allowing the force of *res judicata* attached to them to be set aside. However, its application is subject to the existence of very specific grounds, which do not include more lenient criminal legislation. [35]

31. To date, the Högsta domstolen (Supreme Court, Sweden) has not had occasion to rule explicitly on whether the adoption of a new, more lenient law could constitute a ground for reviewing a final criminal conviction. However, in a 2013 judgment, [36] the Högsta domstolen held that the need to end the serious breach of a fundamental right could constitute grounds for such a review. That judgment appears to support the view that non-application of a more lenient criminal law that has the effect of breaching the fundamental rights of the convicted person would constitute an infringement of the *lex mitior* principle.

32. In the **German** legal system, legal certainty is a fundamental requirement as a general rule and takes precedence over equity on a case-by-case basis. [37] Under criminal law, the principle of *lex*

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[30] In that regard, see judgments of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 18 May 1942, ECLI:NL:HR:1942:10, NJ 1942, 611 and of 12 July 2011, ECLI:NL:HR:2011:BP6878, NJ 2012, 78.

[31] In the Dutch legal system, revision requires, in principle, a circumstance to have already occurred or to already exist at the time of the adoption of the final judgment in respect of which revision is sought. See, in that regard, judgment of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 28 May 1985, Delikt en Delinkwent 85.455; A.J.A. van Dorst, Handboek in strafzaken, nº 47.3.3 (Nieuw gegeven: het novum) en 47.3.3.1.2 (Van 'omstandigheid' naar 'gegeven'). However, in the event of a review on grounds other than more lenient legislation which satisfy the condition of existing before the final judgment is handed down, the *lex mitior* principle should also apply in the context of such proceedings. On that aspect, see Noyon/Langemeijer/Remmelink Strafrecht (ed. Fokkens 2016), remarks on Article 1 of the Dutch Criminal Code, point 17 and, for further explanations, A.J.A. van Dorst, *Herziening in strafzaken*, Wolters Kluwer: Deventer (2021), pp. 76 and 77.

[32] Under Article 78 of the Wet op de rechterlijke organisatie (Law on the organisation of the courts), the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) hears appeals in cassation instituted against deliberations, rulings, judgments and decisions of courts of appeal and lower courts, whether by a party or by the Prosecutor-General, 'in the interests of the law'. It should be noted that use of this exceptional review procedure is rare and it has been used only a handful of times in the last fifteen years. See Final Report on the European Arrest Warrant, CCBE and ELF (2016), p. 249.

[33] For example, see judgments of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 12 July 2011, ECLI:NL:HR:2011:BP6878, NJ 2012, 78 and of 15 June 2021, ECLI:NL:HR:2021:850, NJ 2021, 298.

[34] See, in that regard, judgment of 21 November 2019, Procureur-Generaal bij de Hoge Raad der Nederlanden, C-678/18, EU:C:2019:998, paragraph 19 and the information available on the website of the Dutch Supreme Court.

[35] See Chapter 58 of the Rättegångsbalken (Swedish Code of Procedure) (1942: 70) (SFS2022: 1532).

[36] Judgment NJA 2013: 67. The judgment related to the principle of *ne bis in idem* and the Swedish policy of imposing both tax and criminal penalties for the same conduct and concerned a person found guilty of tax evasion. As regards fundamental rights, in the judgment in question the Högsta domstolen (Supreme Court, Sweden) referred only to the ECHR and to Sweden's obligations under that convention, but its reasoning could easily be transposed to the rights enshrined in the Charter of Fundamental Rights of the European Union.

[37] See, to that effect, Bundesverfassungsgericht (Federal Constitutional Court, Germany), order of 16 January 1980, 1 BvR 127/78, 1 BvR 679/78, Part B.I. 3., BeckRS1980, 3376, paragraph 66.

mitior applies when the law in force at the time of the offence is amended before judgment. [38] In that context, the concept of 'law' is understood broadly, as encompassing all substantive criminal law, [39] and 'judgment' means a judgment at last instance. [40] [41]

33. That general rule is, however, subject to the exception under constitutional law, whereby the *lex mitior* principle can be applied after the final judgment. Under the exception, a convicted person may, under the provisions of the German Code of Criminal Procedure, [42] apply to have proceedings reopened in respect of a criminal judgment that is *res judicata* and based on a provision found by the Bundesverfassungsgericht (Federal Constitutional Court, Germany) to be incompatible with the Basic Law [43] or to be null and void or based on an interpretation that is incompatible with the Basic Law. [44] Consequently, invalidation of an unconstitutional criminal provision in the case-law of the Bundesverfassungsgericht could lead to the application of the *lex mitior* principle. [45]

C. LEGAL SYSTEMS PROVIDING FOR THE APPLICATION OF THE *LEX MITIOR* PRINCIPLE TO FINAL CRIMINAL CONVICTIONS

34. The laws in **four** of the Member States considered (**Lithuania**, **Poland, Portugal** and **Spain**) do not set any particular limits on the application of the *lex mitior* principle to final criminal convictions.

35. In **Spain**, the Criminal Code expressly lays down the obligation to apply the most favourable law to final convictions. [46] In that context, it should be pointed out that application of *lex mitior* differs

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[38] See Paragraph 2(3) of the Strafgesetzbuch (German Criminal Code).

[39] According to the majority view, the concept of 'law' does not include the law of criminal procedure. See, in that regard, Bundesgerichtshof (Federal Court of Justice, Germany), order of 7 June 2005, 2 StR 122/05, Neue Zeitschrift für Strafrecht, NStZ, 2006, p. 32, paragraph 1. See paragraph 65 of this summary for more clarification on the issue of the limitation period. See, together, Satzger, H., Schluckebier, W. (ed.), Widmeier, Strafgesetzbuch, 5th ed., 2021 ('Satzger, Schluckebier, Widmeier, Strafgesetzbuch'), annotations 5 and 7, paragraph 2; see also, to that effect, Fischer, T., Strafgesetzbuch, 70th ed., 2023, C.H. Beck, München, annotations 4 and 7, paragraph 2.

[40] See Bundesgerichtshof (Federal Court of Justice), order of 25 July 2011, 1 StR 631/10, Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht, NZWiSt, 2012, pp. 117, 118; Kindhäuser, U., Neumann, U., Paeffgen, H.-U., Strafgesetzbuch, 6th ed., 2023, C.H. Beck, München, annotation 23a, paragraph 2; See also Satzger, Schluckebier, Widmeier, Strafgesetzbuch, see previous footnote, annotation 20, paragraph 2.

[41] For all practical purposes, note that under German criminal law, application of the *lex mitior* principle is excluded in respect of time-limited rules (Paragraph 2(4) of the Strafgesetzbuch (German Criminal Code)). With regard to rehabilitation and prevention measures, it is provided that the law in force at the time of the judgment applies unless otherwise specified (Paragraph 2(6) of the code). Moreover, it is possible to limit the principle of the retroactive application of the more lenient law by way of legislation. In that regard, see Bundesverfassungsgericht (Federal Constitutional Court, Germany), order of 18 September 2008, 2 BvR 1817/08, ECLI:DE:BVerfG:2008:rk20080918.2bvr181708, Neue Juristische Wochenschrift, NJW, 2008, p. 3769.

[42] Strafprozessordnung (German Code of Criminal Procedure) of 7 April 1987 (BGBl. I, p. 1074, 1319) as amended by the Law of 25 March 2022 (BGBl. I, p. 571). The abovementioned exception can be characterised as a rule providing for the absolute right to resume criminal proceedings supplementing the criteria of the Code of Criminal Procedure. See Schmidt-Bleibtreu, B., Klein, Bethge, aning gerichtsgesetz, 62nd ed., January 2022, C.H. Beck, München, annotation 25, paragraph 79.

[43] Grundgesetz für die Bundesrepublik Deutschland (Basic Law of the Federal Republic of Germany) of 23 May 1949, as amended by the Law of 19 December 2022 (BGBl. I p. 2478).

[44] Paragraph 79(1) of the Gesetz über das Bundesverfassungsgericht or Bundesverfassungsgerichtsgesetz (Law on the Federal Constitutional Court, Germany) of 11 August 1993 (BGBl. I, p. 1473), as amended by the Law of 20 November 2019 (BGBl. I p. 1724).

[45] See, to that effect and in reference to the provisions on the possibility of reopening proceedings under the Code of Criminal Procedure, Satzger, Schluckebier, Widmeier, Strafgesetzbuch, (see footnote 39), annotation 20, paragraph 2.

[46] Thus, Article 2(2) of the Spanish Criminal Code establishes, as an exception to the requirement of *lex praevia*, that criminal laws favourable to the accused are to have retroactive effect even if, at the time of their entry into force, a final conviction has been handed down and the convicted person is serving a sentence. If there is any doubt as to which law is more favourable,

according to whether it concerns acts not yet tried or with no final judgment on the one hand or final convictions on the other. In the first case, the new, more favourable, legislation will be applied by the court of first instance, of appeal or of cassation, depending on the procedural stage at which the new law comes into force. [47] In the second, an exceptional review procedure may be initiated. [48] [49]

36. Final sentences are reviewed in cases where, after comparative examination, it transpires that the sentence actually imposed is harsher than that which would be imposed under the new criminal legislation. In addition, sentences for acts that have been decriminalised must also be reviewed. On the other hand, sentences that have been enforced cannot be reviewed, without prejudice to the fact that the court must first examine whether the act penalised is still considered a crime or could attract a lower sentence. [50]

37. In **Portugal**, the law does not impose any restrictions on the application of the *lex mitior* principle. Therefore, it must also be applied to final criminal convictions, resulting in a review. [51] In that regard, the national legislature has established a dual system, whereby *lex mitior* applies automatically and enforcement of the custodial sentence ceases immediately if the new criminal law entails a reduction in the maximum limit of the sentence, provided that the convicted person has served the sentence corresponding to that limit. [52] On the other hand, in cases where the person has not yet served the new maximum limit of the applicable sentence, proceedings must be reopened to ensure the more favourable criminal law is applied. [53]

38. It should be noted that, despite the fact that the Portuguese Constitution recognises the finality of judgments as a necessary emanation of the principle of legal certainty, it is accepted that the principle is not absolute and must be disapplied when the specific circumstances of the case require the more lenient criminal law to prevail. [54] Mandatory application of the *lex mitior*

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the convicted person is to be heard. However, acts committed at a time when a temporary law was in force are to be punished in accordance with that law, unless express provision is made otherwise.

47 For example, judgment of the Tribunal Supremo (Supreme Court, Spain) No 760/1997 of 18 November 1997 provides that, in view of the fact that more lenient criminal provisions applied prior to the trial stage (enjuiciamiento oral), the new provision should have been applied by the court of first instance.

48 The remedy is provided for in Article 954 et seq. of the Ley de enjuiciamiento criminal (Code of Criminal Procedure) and is restricted to a finite list of justifying grounds.

49 It should be noted that, following a recent amendment to the Criminal Code concerning crimes against sexual freedom introduced by Organic Law 10/2022 of 6 September 2022, the Spanish courts are seeing an influx of appeals of final convictions on a point of law that has generated lively debate and numerous judgments (see, inter alia, judgment of the Tribunal Supremo (Supreme Court, Spain) No 343/2023 of 8 February 2023). In that regard, the Tribunal Supremo has had occasion to point out that the adaptation of sentences to the new legislative text under the *lex mitior* principle is not limited to sentences currently being enforced. Also subject to adaptation are sentences that are at the decision-making stage, sentences for which the trial is at the completion stage and sentences that are the subject of an appeal or of an appeal in cassation, in order to determine whether the sentence in that specific case may be more favourable (see judgment of the Tribunal Supremo (Supreme Court, Spain) No 4848/2022 of 21 December 2022).

50 The Spanish Criminal Code contains a series of transitional provisions that govern in detail the procedural conditions for reviewing sentences.

51 See Constituição da República Portuguesa Anotada, Coimbra Editora, 2007, Gomes Canotilho *v.* Vital Moreira, and judgment of the Supremo Tribunal de Justiça (Supreme Court, Portugal) of 6 January 2021, Case 109/12.8GDARL.E3-A.S1.

52 Article 2(4) of the Portuguese Criminal Code.

53 Article 371-A of the Code of Criminal Procedure. See also judgments of the Tribunal Constitucional (Constitutional Court, Portugal) No 164/2008, Case No 1042/07, and No 201/2010, Case No 904/08.

54 See judgment of the Tribunal Constitucional (Constitutional Court, Portugal) No 677/98, Case No 194/97, and Miranda, J., Manual de Direito Constitucional, vol. II, 3rd edition, Coimbra, 1996, p. 494.

principle to final criminal convictions follows directly from the law and has also been confirmed by both the case-law and legal literature. [55]

39. In **Lithuania**, a criminal law that eliminates, eases or otherwise facilitates the legal situation of the perpetrator of an offence has retroactive effect, applying equally to perpetrators of offences committed before the law comes into force, to persons currently serving a sentence and to those with a criminal record. [56] It follows that, in the Lithuanian legal system, application of the *lex mitior* principle to final criminal convictions is accepted without any particular restriction.

40. The manner in which that principle is to be applied in respect of convicted persons is governed by the provisions of the Code of Criminal Procedure. [57] Under those provisions, *lex mitior* is applied by the court ruling at first instance, at the request of the convicted person, his or her lawyer, the public prosecutor or the authority responsible for enforcing the sentence. The public prosecutor or any of the abovementioned persons present at the hearing may, inter alia, speak on the matter at issue or challenge the grounds relied on in the convicted person's application. [58] If the court in question finds the application well-founded, it will issue an order for clemency or order that the sentence be reduced, the offence reclassified or the criminal record erased. The judgment may be appealed to a higher court.

41. In **Poland**, criminal law provides that if, at the time of the judgment, understood in the broad sense as including all stages and instances of criminal proceedings, including the sentence enforcement stage, [59] a law differs from that in force at the time when the offence was committed, the new law must be applied, provided it is more favourable to the perpetrator of the offence. [60] In this context, the concept of 'law' includes any change to the applicable legal regime [61] and whether the new law is more favourable is assessed *in concreto*. Moreover, the term 'law' should not be interpreted as covering provisions of a procedural nature. [62]

42. Some provisions of Polish criminal law relate to more specific cases. First, they provide that if a sentence imposed by final judgment but not yet (fully) enforced is harsher than the maximum sentence under the new law, it must, in principle, be reduced to the new maximum sentence. Second, the provisions state that, where, under a new law, the act to which a judgment relates is no longer punishable by a custodial sentence, the custodial sentence imposed is to be converted

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55 As argued by Canotilho, G., and Moreira, V., in Constituição da República Portuguesa Anotada, vol. I, Coimbra, 2007, p. 496), 'since the Constitution does not provide for any exception, the retroactive application of the more favourable criminal law [...] must apply, at least in principle, even in "final cases" and the issue must consequently be re-assessed [...]. It does not make sense for a person to continue serving a sentence for an act that is no longer a crime or now attracts a lighter sentence'.

56 Article 3(2) of the Lietuvos Respublikos baudžiamasis kodeksas (Lithuanian Criminal Code) (Žin. 2000, No 89-2741).

57 Article 362[1] of the Lietuvos Respublikos baudžiamojo proceso kodeksas (Lithuanian Code of Criminal Procedure) (Žin. 2002, No 37-1341). Note that until the new wording of the Lithuanian Code of Criminal Procedure came into force in 2002, when the legislature introduced more lenient criminal provisions, it did not in most cases lay down any explicit rules for implementation as regards the review of final convictions.

58 Lietuvos Respublikos baudžiamojo proceso kodekso komentaras V-XI dalys (Goda, G. (et al.)) – Vilnius: VĮ Teisinės informacijos centras, 2003, p. 360.

59 See, in that regard, Kozłowska-Kalisz, P., *Kodeks karny. Komentarz aktualizowany*, Article 4.

60 Article 4(1) of the Ustawa Kodeks karny (Polish Criminal Code) of 6 June 1997 (Dz. U. of 2022, position 1138, consolidated text).

61 Judgment of the Sąd Najwyższy (Supreme Court, Poland) of 12 May 2021, II KK 47/21.

62 Lachowski, J., *Kodeks karny. Komentarz, wyd. III*, Article 4. However, the principle of *lex mitior* is applicable in the case of a provision that is both substantive and procedural. Thus, in its resolution of 21 May 2004, I KZP 6/04, the Supreme Court found that the principle applies to the provision on protective measures because, in addition to specifying the procedure, it also specifies the substantive condition for its application.

into a fine or a sentence restricting freedom. [63] In such cases, it is for the court that handed down the judgment at first instance to rule. [64]

III. APPLICATION OF THE *LEX MITIOR* PRINCIPLE IN THE EVENT OF A CHANGE *IN BONIS* IN THE CASE-LAW

43. In order to determine the scope of the *lex mitior* principle in the national legal systems, it is also necessary to examine whether that principle can be applied to the case-law and, consequently, whether a change *in bonis* in the case-law could trigger its application.

44. In that regard, examination of the various national legal systems shows that application of the *lex mitior* principle requires legislative intervention. Therefore, in general, the *lex mitior* principle does not apply in the event of a change *in bonis* in the case-law. [65]

45. This implies, moreover, that in States where it is possible to review final convictions, reversal of the case-law does not give rise to such a review, even when the case-law is from the supreme courts. There are many justifications put forward for this in the case-law.

46. In **Spain**, in that respect, the judgment of the Grand Chamber of the Tribunal Supremo (Supreme Court) settled the issue in a case concerning, inter alia, the interpretation by the Tribunal Constitucional (Constitutional Court) of the rules on the interruption of the limitation period, ruling that a judgment of that court interpreting the interruption of the statute of limitations in a manner different from that previously held could not give rise to an appeal on a point of law. [66] In **Italy**, the Corte costituzionale (Constitutional Court) [67] has ruled on the possibility of extending the revocation of conviction decisions, limited by law solely to cases of *abrogatio criminis* or to

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[63] Article 4(2) and (3) of the Ustawa Kodeks karny (Polish Criminal Code) of 6 June 1997 (Dz. U. of 2022, position 1138, consolidated text).

[64] See Article 95aa(1) of the Ustawa Kodeks postępowania karnego (Polish Code of Criminal Procedure) of 6 June 1997 (Dz. U. of 2022, position 1375, consolidated text). In the cases described, the decision is handed down in the form of an order, by a judge sitting alone, and can be appealed (Article 31(1) of the code).

[65] In relation to **Spain** for example, see judgments of the Tribunal Supremo (Supreme Court), No 561/2000 of 6 April 2000 (legal ground No 5), and No 1053/2000 of 16 June 2000 (legal ground No 3) among others cited by Rodríguez Ramos, L. (ed.), Código Penal concordado y comentado con jurisprudencia y leyes penales especiales y complementarias, 4ª ed., La Ley, 2011, p. 131.

In relation to **Greece**, see Φράγκος Κ, *Online κατ' άρθρο ερμηνεία Ποινικού Κώδικα*, Article 2, available at sakkoulas-online, paragraphs 30 and 46.

In relation to **France**, see Moumouni, I. 'Le principe de la rétroactivité des lois pénales plus douces: une rupture de l'égalité devant la loi entre délinquants ?' *Revue internationale de droit pénal* 2012, vol. 83.

In the case of **Sweden**, the same reasoning was applied in relation to a preliminary ruling by the Court of Justice that a national criminal provision was incompatible with EU law. See judgments of the Högsta domstolen (Supreme Court) NJA 1981, p. 350, NJA 2006 N 23, NJA 2011, N 26, NJA 2013 p. 42, NJA 2013: 57, and NJA 2016: 28. The only exception in Swedish law could result from judgment of the Högsta domstolen NJA 2013: 67, see paragraph 32 of this summary.

In the case of the **Netherlands**, it has been clarified that a change in the case-law which takes place after a final conviction cannot give rise to a review of the conviction, since such a change may, for example, be linked to societal developments and it would not be desirable for such changes to cause a flood of applications for review or hinder the development of the law, judgment of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 28 May 1985, Delikt en Delinkwent 85.455; A.J.A. van Dorst, Handboek in strafzaken, No. 47.3.3 (Nieuw gegeven: het novum), points 47.3.3.1.1 and 47.3.3.1.2.

The prevailing opinion in **Germany** refers to the wording of Paragraph 2(3) of the Strafgesetzbuch (German Criminal Code), which requires amendment of the law in force when the offence was completed prior to judgment.

[66] Agreement adopted by the fifth chamber of the Tribunal Supremo (Supreme Court) of 26 February 2009 and applied in the judgment of the Tribunal Supremo of 26 March 2009. On this aspect, see Vicente Ballesteros, T., *El proceso de revisión penal*, ed. Bosch, 2013, p. 206 et seq.

[67] Judgment of the Corte costituzionale (Constitutional Court, Italy) of 12 October 2012, No 230.

cases where the criminal provision has been found unconstitutional, [68] to also include cases where the accused's conduct is found to fall outside the scope of criminal law, not by the legislature or by the Corte costituzionale, but by the ordinary courts in the event of a change in the case-law. In its judgment, it limited the scope of the principle of retroactivity *in mitius* solely to the law or to acts having the force of law.

47. In all Member States where the *lex mitior* principle applies, non-application of that principle in the event of a change in the case-law stems from the principles of legality and legal certainty. These principles also imply adopting a strict approach to defining the scope of the national court's power when the *lex mitior* principle is applied. [69]

IV. EFFECTS OF THE INVALIDATION OF CRIMINAL PROVISIONS ON THE APPLICATION OF THE *LEX MITIOR* PRINCIPLE

48. As a preliminary point, it should be noted that while most of the Member States under consideration have a constitutional court tasked with examining the compatibility of laws with the constitution (**Belgium**, **Bulgaria**, **France**, **Germany**, **Italy**, **Lithuania**, **Poland**, **Portugal** and **Spain**), this is not the case in four of the Member States analysed (**Ireland**, **Greece**, the **Netherlands** and **Sweden**), which do not have such a court. The legality of laws is reviewed by other courts in those countries. Those States will be discussed separately at the end of this section (**C**).

49. As regards legal systems with a constitutional court, it seems appropriate to draw a distinction between two groups of Member States, namely those making provision for the review of final convictions (**Lithuania**, **Poland**, **Portugal** and **Spain**) (**A**) and those where such a review is not possible (**Belgium**, **Bulgaria**, **France**, **Germany** and **Italy**) (**B**).

A. EFFECTS OF THE INVALIDATION OF CRIMINAL PROVISIONS IN LEGAL SYSTEMS PROVIDING FOR THE APPLICATION OF *LEX MITIOR* TO FINAL CRIMINAL CONVICTIONS

50. The **four** Member States in the first group (**Lithuania**, **Poland**, **Portugal** and **Spain**) confer binding force and *erga omnes* effect on constitutional court judgments of unconstitutionality and regulate, in detail, the consequences of such judgments on the application of provisions that are more favourable to convicted persons.

51. In **Portugal**, it follows from the Constitution [70] that a finding that a provision is unconstitutional operates retroactively, producing effects from the date the provision found unconstitutional entered into force. The finding of unconstitutionality has the effect of reinstating the revoked legal provision. [71]

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[68] Article 673 of the Code of Criminal Procedure.

[69] For example, when determining whether the provisions at issue are more favourable, the court is not allowed to apply only partially the positive aspects of both provisions, as in doing so it would be creating a new provision (*lex tertia*) and would thus be exercising legislative functions outside its jurisdiction. In relation to **Spain**, see judgment of the Tribunal Supremo (Supreme Court), No 752/2002 of 29 April 2002 and judgment No 386/2020 of 9 July 2020, and Transitional Provision Two of the Criminal Code. In relation to **Greece**, see Φράγκος Κ, *Online κατ' άρθρο ερμηνεία Ποινικού Κώδικα*, Article 2, available at sakkoulas-online, paragraph 15.

[70] Article 282 of the Portuguese Constitution.

[71] In principle, unless the Tribunal Constitucional (Constitutional Court, Portugal) rules otherwise, a finding of unconstitutionality with general binding force dates the effects of the unconstitutionality of the provision back to when the unconstitutional provision entered into force, thus requiring, in practice, that specific situations potentially falling within the scope of the

52. However, final convictions are not affected by the effects of a finding of unconstitutionality, [72] meaning that although a provision considered unconstitutional no longer has legal effects, it continues to apply in the case of convictions that have become final. By way of exception, where the provision deemed unconstitutional is less favourable to the accused, [73] the Tribunal Constitucional (Constitutional Court, Portugal) may expressly rule that the cases tried are also covered by the effects of retroactivity and reinstatement arising, in principle, from the finding of unconstitutionality. This exception is a concrete expression of the principle of retroactivity of the more favourable criminal law (*lex mitior*).

53. It follows that when the Tribunal Constitucional rules with general binding force that a criminal provision is unconstitutional, thereby setting aside its effects, it must, where appropriate, expressly state that the more favourable legal regime applies to cases tried.

54. Although there are considerable similarities between **Spanish** and **Portuguese** law as regards the scope of the *lex mitior* principle, the scope of the principle is broader in **Spain** since judgments of unconstitutionality also produce effects with regard to final criminal convictions. Thus, in the **Spanish** legal system, [74] a judgment that a law is unconstitutional does not mean that it is possible to challenge proceedings that have ended in a judgment with force of *res judicata* in which unconstitutional laws were applied. The only exception to this rule is in criminal or administrative proceedings relating to a penalty procedure where the invalidity of the rule applied entails reduction of the penalty or exclusion, exemption or limitation of liability. In that case, once the Tribunal Constitucional (Constitutional Court, Spain) finds a criminal provision to be unconstitutional, it must cease to be applied and the judgment has the same effects as a new law as regards acts committed previously.

55. This approach contrasts with the more limited application of the *lex mitior* principle as regards procedural provisions. [75] The retroactive effect of the more favourable rule does not apply to procedural rules, which are governed by the principle of *tempus regit actum*.

56. Note that there is some debate about whether the rules governing limitation periods are substantive or procedural in nature. Academic lawyers point out that the rules can be substantive if they govern the limitation periods for crimes and penalties or procedural if they relate to the taking of certain procedural steps. In the latter case, the rules will be subject to the principle of

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judgment are reconstituted as if the provision found unconstitutional had never existed in the legal system (as appropriate, applying – or not applying – to those situations an earlier provision repealed by the provision found unconstitutional and therefore reinstating the earlier provision).

[72] A finding of unconstitutionality with general binding force in respect of any provision does not affect final judicial decisions. In other words, it neither amends nor revokes the decision of the court which applied it and which has become final, nor does it constitute a basis for invalidity or for an exceptional review procedure; Miranda, J., Manual de Direito Constitucional, vol. VI, Coimbra Editora, 2001).

[73] According to Article 282 of the Portuguese Constitution, the expression 'criminal matters' refers to substantive law. However, it is apparent from legal literature and the most recent case-law that the principle that the accused must be given the more favourable treatment applies not only to substantive criminal law, but also to rules of criminal procedure affecting the criminal liability or fundamental rights of the accused or the detainee, commonly referred to as procedural rules of a substantive nature. In that regard, reference is made to the judgment of the Supremo Tribunal de Justiça (Supreme Court, Portugal) of 10 November 2022 in case No 35/15.9PESTB-Z.S 2, which refers to the reasoning behind the judgment of the Supremo Tribunal de Justiça of 6 September 2022, Case No 4243/17.0T 9PRT-K.S 1.

[74] Article 40 of Ley Orgánica 2/1979, del Tribunal Constitucional (Organic Law 2/1979 of the Constitutional Court of 3 October 1979).

[75] See recent decisions (Auto) of the Tribunal Supremo (Supreme Court) No 3772/2023 of 31 March 2023 and No 3577/2023 of 23 March 2023.

tempus regit actum. Consequently, they cannot be deemed retroactive, even if they are included in the Spanish Criminal Code. [76]

57. The **Polish** legal system resembles Spanish law not only as regards the broad scope accorded to the *lex mitior* principle in relation to final convictions, but also as regards its application to the provisions governing limitation periods and procedural time limits.

58. In that Member State, it is indisputable that a judgment of the Trybunał Konstytucyjny (Constitutional Court, Poland) finding a provision applicable to the perpetrator of an offence unconstitutional is likely to have a direct impact on his or her situation in criminal proceedings. The term 'amendment of the law' which determines whether the *lex mitior* principle is triggered must include findings of unconstitutionality [77] which, in principle, have *ex nunc* effects.

59. A finding by the Trybunał Konstytucyjny that a provision is incompatible with the Constitution does not imply that judgments handed down on the basis of that provision will be automatically set aside or that the proceedings concerned are invalid, but provides an opportunity to initiate the relevant reopening proceedings to allow the case to be examined in the light of the state of the law as it stands following the judgment of the Trybunał Konstytucyjny. [78] As regards the consequences of a finding of unconstitutionality, note that, in proceedings reopened following a judgment of the Trybunał Konstytucyjny, the criminal court is required to take account of the provision found unconstitutional when it examines the law that, of those currently or previously in force, is the most favourable to the perpetrator of the offence. [79]

60. As regards the rules on limitation periods, the Sąd Najwyższy (Supreme Court, Poland) has pointed out that the *lex mitior* principle as provided for in the Criminal Code [80] does not mean that the possibility of prosecuting convicted persons cannot change over time and does not prevent the application of a less favourable law to persons convicted in terms of the statute of limitations for the crime. [81] Application of the statute of limitations is inextricably linked to the judgment handed down in relation to an offence and to the applicable criminal penalty. According to legal literature, the question of the duration of time limits, under the new law and the law previously in force, is irrelevant to the application of the principle of *lex mitior retro agit*. The sole constitutional condition for the application of a criminal penalty is the criminalisation of the act at issue at the time it was committed. The rules on limitation periods are therefore irrelevant to that assessment. Consequently, their subsequent amendment cannot be regarded as a breach of the *lex mitior* principle. [82]

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[76] The Explanatory Memorandum to LO 5/2010 classifies such provisions as procedural. Muñoz Conde, F., García Arán, M., Derecho Penal. Parte general, 8th ed., Tirant lo Blanch, 2010, pp. 406 and 407. See also judgment No 7385/2022 of the Tribunal Supremo (Supreme Court, Spain) of 4 May 2022, which restates that the principle of *tempus regit actum* applies to procedural rules and that subsequent procedural legislation does not have retroactive effect and, unlike a more favourable criminal law, cannot alter the force of res judicata of a judgment. The case in point concerned measures to support persons with disabilities in criminal proceedings, measures that were non-existent when judgment was handed down on an accused person with a hearing impairment.

[77] Lachowski, J., *Kodeks karny. Komentarz, wyd. III*, Article 4.

[78] Nita-Światłowska, B., *Wznowienie postępowania w następstwie stwierdzenia niekonstytucyjności norm a zasada prawomocności orzeczeń sądowych*, p. 174.

[79] Nita-Światłowska, B, see footnote 77, p. 183.

[80] Article 4(1) of the Polish Criminal Code.

[81] Order of the Sąd Najwyższy (Supreme Court) of 23 October 2020, II DSI 41/20.

[82] Wróbel, W., *Zmiana normatywna i zasady intertemporalne w prawie karnym*.

61. Note also that, in one of its judgments, the Trybunał Konstytucyjny explained that a change in the length of limitation periods does not affect either the fact of the penalty itself or the amount of the financial penalty that can be imposed. Limitation periods are not in the nature of a safeguard because they are not set in relation to the perpetrator of the offence but according to the purpose of the punishment. The retroactive extension of limitation periods is assessed in the light of the principle of the rule of law but is not related either to the breach of acquired rights or to the protection of trust in the legislation determining how the offence is penalised. [83]

62. Lastly, in another judgment, the Trybunał Konstytucyjny confirmed that the retroactive extension of limitation periods does not come under the principle *lex severior poenali retro* and does not infringe the principle laid down in the Constitution that citizens' trust in the law must be protected. [84]

63. Similarly to Poland, findings of unconstitutionality in **Lithuania** have *ex nunc* effects, meaning that a law can no longer be implemented from the day on which the judgment of the Lietuvos Respublikos Konstitucinis Teismas (Constitutional Court of the Republic of Lithuania) finding it unconstitutional has been officially published. Conscious of the legal uncertainties that could arise from the finding that a provision, including a criminal provision, is unconstitutional, the approach adopted in practice by the Konstitucinis Teismas consists of deferring not the application of the legal provisions found invalid but the entry into force of its own judgments, thus giving the legislature the necessary time to act. [85]

B. EFFECTS OF THE INVALIDATION OF CRIMINAL PROVISIONS IN LEGAL SYSTEMS PRECLUDING THE APPLICATION OF *LEX MITIOR* TO FINAL CRIMINAL CONVICTIONS

64. For those Member States in the second group (**Belgium**, **Bulgaria**, **France**, **Germany** and **Italy**) where no provision is made in principle for the review of final criminal convictions, there is broad convergence in terms of the effects of judgments invalidating a criminal law.

65. In **German** law, the concept of *lex mitior* must be understood broadly as encompassing all substantive criminal law. Procedural criminal provisions are, in principle, excluded. [86] Thus, where a limitation period is amended, the amended law applies if there are no transitional arrangements, in so far as limitation, as a procedural obstacle, relates only to prosecution and does not affect the criminal penalty. [87] Nevertheless, account must be taken of a change in the

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[83] Judgment of the Trybunał Konstytucyjny (Constitutional Court) of 25 May 2004, SK 44/03.

[84] Judgment of the Trybunał Konstytucyjny of 15 October 2008, P 32/06.

[85] That possibility was implemented for the first time in a 2002 judgment, when the Lietuvos Respublikos Konstitucinis Teismas (Constitutional Court, Lithuania) found a number of provisions of the Law on local autonomy contrary to the Lithuanian Constitution (judgment of 24 December 2002 on the competence of representative and executive municipal institutions). It held that the finding – and resulting vacuum – risked seriously damaging the proper functioning of the mechanism of local autonomy and State governance. Where necessary, the Lietuvos Respublikos Konstitucinis Teismas applies the same approach to enable the legislature to remove the *lacunae legis* that would ensue if its judgment was officially published immediately after being handed down and in cases where those *lacunae legis* could undermine certain values defended and protected by the Constitution (judgments of the Lietuvos Respublikos Konstitucinis Teismas of 19 January 2005 and 23 August 2005).

Nevertheless, following a judgment of unconstitutionality, the person concerned could initiate the procedure described in paragraph 40 of this summary.

[86] See, in that regard, paragraph 32 and footnote 39 of this summary.

[87] See Bundesgerichtshof (Federal Court of Justice, Germany), order of 7 June 2005, 2 StR 122/05, cited in footnote 39, p. 32, paragraph 1. See also, to that effect, Bundesverfassungsgericht (Federal Constitutional Court), order of 31 January 2000, 2 BvR 104/00, Neue Juristische Wochenschrift, NJW, 2000, p. 1554, 1555.

limitation period where an extension of the limitation period is the consequence of a heavier penalty. [88] The more lenient law when the act was committed applies in respect of the limitation period when prosecution is time-barred, applying the substantive criminal law in force at the time the act was committed. [89]

66. As regards the effects of a finding that a provision is unconstitutional, it should be borne in mind that, in such a case, German law expressly provides for the possibility of reopening criminal proceedings in accordance with the provisions of the Code of Criminal Procedure. [90] Thus, the invalidation of an unconstitutional criminal provision by decision of the Bundesverfassungsgericht (Federal Constitutional Court, Germany) could lead to the application of *lex mitior* if the convicted person seeks to have the criminal proceedings reopened in order to have the criminal judgment based on that unconstitutional criminal provision set aside or rectified and invokes the *lex mitior* principle.

67. A constitutional exception in respect of a criminal judgment that is *res judicata* does not entail a prohibition on sentence enforcement. A convicted person may apply to have proceedings reopened under the Code of Criminal Procedure, seeking to have a criminal judgment based on an unconstitutional rule set aside or rectified. The reason why provision is made only for the possibility of resuming proceedings, without enforcement being directly affected, becomes very clear in cases where the criminal penalty may be based on other rules of criminal law, without changing the guilty verdict or the sentence imposed. [91] Furthermore, an application to have proceedings reopened does not have suspensive effect under the law of criminal procedure but the court seised may, in specific cases, order a stay or suspension of enforcement. [92] Prohibition of enforcement is the effect of the order authorising the reopening of proceedings, which terminates the *res judicata* effect of the judgment under appeal. [93]

68. In the **Belgian** legal system, if an action brought before the Cour constitutionnelle (Constitutional Court, Belgium) seeking to have a law set aside is well founded, the court will set aside the law in full or in part. That setting-aside is binding *erga omnes* and in principle produces its effects *ex tunc*, as the Constitutional Court's judgments setting aside laws have retroactive effect, in principle. [94] [95] Thus, in certain situations, application of the principles governing the

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88 In that regard, note that the limitation period is linked to the criminal penalty under Paragraph 78 of the Strafgesetzbuch (German Criminal Code).

89 See, in detail, Bundesgerichtshof (Federal Court of Justice, Germany), order of 7 June 2005, 2 StR 122/05, cited in footnote 39, p. 32, paragraph 1.

90 See paragraph 33 and footnote 42 of this summary.

91 See Bundesverfassungsgericht (Federal Constitutional Court), order of 7 March 1963, 2 BvR 56/63, Verwaltungsrechtsprechung, VerwRspr, 1963, p. 775, 776.

92 See Paragraph 360 of the Strafprozessordnung (Code of Criminal Procedure).

93 See Knauer, Ch., Kudlich, H., Schneider, H., Engländer, Zimmermann, Münchener Kommentar zur StPO, vol. 1, 2019, C.H. Beck, München, annotation 1, paragraph 360, referring to Paragraph 370(2) and Paragraph 449 of the Strafprozessordnung (Code of Criminal Procedure).

94 See the loi spéciale sur la Cour constitutionnelle (Special Law on the Constitutional Court) of 6 January 1989, Moniteur belge, 7 January 1989, p. 315. According to the third paragraph of Article 8 of that law, the court may, if it deems necessary, indicate, by way of a general provision, which of the effects of the provisions set aside are to be regarded as definitive or provisionally maintained for the period determined by the court.

95 Note also that Article 10 of the Special Law on the Constitutional Court provides that, in so far as they are based on a provision of a law, decree or rule referred to in Article 134 of the Constitution that has subsequently been set aside by the Constitutional Court, judgments handed down by criminal courts that are res judicata may be withdrawn in full or in part by the court that issued them. For further details in that regard, see Article 10 et seq. of the Special Law on the Constitutional Court.

consequences of the Constitutional Court's judgments setting aside laws appears sufficient to enable the accused to benefit from the advantage of the invalidation of a national provision, without the need to apply the *lex mitior* principle as such. [96]

69. In that regard, the issue of the application of the *lex mitior* principle after a provision is set aside by the Constitutional Court has already arisen in Belgian law in relation to a particular scenario in the specific context of customs and excise duties. [97] In a 2010 judgment, the Cour de cassation (Court of Cassation, Belgium) held that 'the retroactivity of the second, more favourable law is not defeated by the circumstance that, after the offence and before its judgment, the partial unconstitutionality of the former sentence led to temporary impunity'. [98]

70. Two further judgments were subsequently handed down by the Constitutional Court. [99] In those judgments, the Constitutional Court held that 'given that [the provision] was only partially set aside, it was only partially removed from the legal order subsequent to judgment No 140/2008'. [100] The court held that 'it follows from the partial setting-aside of [the provision in question] that, pending intervention by the legislature, the court could impose the fine stipulated by the provision if it took the view that the facts were sufficiently serious to merit such a sentence or, alternatively, that it could impose a lesser fine, either because of extenuating circumstances or pursuant to the principle of proportionality'. [101] According to the Constitutional Court, 'it is therefore for the lower court to determine in the case in point whether or not the fine imposed at the time of the judgment is a lesser sentence within the meaning of Article 2(2) of the Criminal Code than the sentence under the legislative provision partially set aside by the Court'. [102]

71. In **Bulgaria**, a criminal provision found unconstitutional by the Konstitusionen sad (Constitutional Court) no longer applies from the date on which the Konstitusionen sad's judgment enters into force, since the provision ceases to have effect for the future.

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[96] See also, in that regard, Cass. RG P.09.0458.F, 2 September 2009, as well as Cass. 23 September 2009 and Cass. RG P.09.0837.F 28 October 2009. Regarding the judgment of 28 October 2009, see also Kuty, F., 'Les conséquences de l'annulation d'une disposition pénale par la Cour constitutionnelle sur les règles de droit transitoire en matière pénale', J.T., 2011, pp. 49 to 54, in particular footnotes 35, 42 and 46.

[97] That case concerned the setting-aside by the Cour constitutionnelle (Constitutional Court, Belgium), in judgment No 140/2008 of 30 October 2008, of the first paragraph of Article 39 of the loi du 10 juin 1997, relative au régime général, à la détention, à la circulation et aux contrôles des produits soumis à accise (Law of 10 June 1997 on the general arrangements for the holding, movement and monitoring of products subject to excise duty), 'in so far as these do not allow the criminal court, in the event of mitigating circumstances, to reduce the fine provided for in that provision and in so far as, in failing to provide for a maximum fine and a minimum fine, they could have the disproportionate effects described in B.9.3'. The legislature subsequently took action in December 2009, replacing the article set aside with a new article.

[98] In that context, note that, in a judgment of 22 April 2010, the Cour d'appel de Liège (Court of Appeal of Liège, Belgium) ruled, based on the Law of 10 June 1997, that a fine amounting to ten times the duties evaded could not be imposed based on the provision set aside on the ground that 'the provision enacting a sentence at the time of the offence was set aside and (that) this setting-aside benefits pending cases'. That judgment was quashed by the Cour de Cassation, Cass. RG P.10.0856.F, 3 November 2010, *J.T.* 2011, p. 49. Outlined by Kuty, F., 'Les conséquences de l'annulation d'une disposition pénale par la Cour constitutionnelle sur les règles de droit transitoire en matière pénale', J.T., 2011, pp. 49 to 54, in his note on the judgment of the Kassationhof (Court of Cassation) of 3 November 2010, quashing the judgment of the Cour d'appel de Liège (Court of Appeal, Liège).

[99] Cour. Const. 19 July 2012, judgment No 97/2012, and Cour. Const. 28 February 2013, judgment No 26/2013. On the case-law, see also Rosoux, G., *Contentieux constitutionnel*, Brussels, Larcier, 2021, pp. 701 to 703 and Vandevenne, F., 'Annulez, annulez, il en restera toujours quelque chose', *Rev. dr. Pén.*, 2013, p. 329 to 336.

[100] See B.11 to B.14.1 of the judgment of 19 July 2012 and the judgment of 28 February 2013.

[101] See in particular B.15 and B.16 of the judgment of 19 July 2012 and of the judgment of 28 February 2013.

[102] For judgments of the Kassationhof (Court of Cassation, Belgium) referring to that case-law of the Cour constitutionnelle (Constitutional Court, Belgium), see in particular Cass. AR P.13.1420.N, 27 May 2014, as well as Cass. RG P.12.0235.N, 7 May 2013 and 11 June 2013.

72. The Konstitusionen sad's judgment therefore has a remedial effect, since the effect of the law is reinstated to what it was before the amendment was found unconstitutional. [103] Moreover, a rule of criminal law that has been found unconstitutional could prove more favourable to the perpetrator of a criminal offence, because although unconstitutionality exists objectively, it must be formally established by a judgment of the Konstitusionen sad. Until such a finding is made, a provision found to be unconstitutional remains in force and, compared with earlier legislation, it appears to be a different law for the purposes of the application of the *lex mitior* principle. The effect of such a provision extends both to cases that have not ended in a final conviction and to cases arising between the date when the provision enters into force and when it is found to be unconstitutional. [104]

73. In the **French** legal system, the repealing effect of a finding of unconstitutionality constitutes an obstacle to the courts applying the law in question, not only in the proceedings that gave rise to the priority question on constitutionality, but also in all proceedings pending on the date of the judgment. [105] [106] Academic lawyers point out that this is a public policy rule for both the administrative and ordinary courts. 'Unless otherwise indicated in the constitutional court's judgment, a legislative provision found unconstitutional by the Conseil constitutionnel (Constitutional Council, France) may not be applied because to do so would amount to accepting that it can perform its function while applying provisions that are invalid at the time it delivers its ruling.' [107]

74. As regards **Italian** law, there has been some academic debate [108] surrounding the position adopted by the Corte costituzionale (Constitutional Court) following the judgment of the European Court of Human Rights in *Scoppola v. Italy* [109] concerning the application of the *lex mitior* principle before delivery of a final judgment. [110]

75. After recalculating the sentence imposed on the convicted person as indicated by the ECtHR, the Corte costituzionale addressed the issue for all other persons sentenced to life imprisonment in the same situation as Mr Scoppola and who were entitled to be tried in accordance with the more favourable provisions of the *lex intermedia* but who had not brought an appeal before the ECtHR.

76. In that regard, the Corte costituzionale first pointed out that the obligation to comply with final judgments of the ECtHR must be understood as implicitly extending to *restitutio in integrum* in favour of all those who, even though they had not brought an appeal in good time before the ECtHR, have been subject to a violation identical to that found in the specific case. In that context,

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[103] See judgment of the Konstitusionen sad (Constitutional Court, Bulgaria) (P-22-95 KC).

[104] See 'Nakazatelno pravo – obshta chast', Alexander Stoynov, p. 119.

[105] Disant, M., Les effets dans le temps des décisions QPC, Nouveaux cahiers du Conseil constitutionnel No 40 (dossier: le Conseil constitutionnel, trois ans de QPC – June 2013) (https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/les-effets-dans-le-temps-des-decisions-qpc).

[106] See, to that effect, judgments of the Conseil constitutionnel of 25 March 2011 No 2010-108 QPC (https://www.conseil-constitutionnel.fr/decision/2011/2010108QPC.htm) and

No 2010-110 QPC (https://www.conseil-constitutionnel.fr/decision/2011/2010110QPC.htm).

[107] Disant, M., Les effets dans le temps des décisions QPC, Nouveaux cahiers du Conseil constitutionnel No 40 (dossier: le Conseil constitutionnel, trois ans de QPC – June 2013) (https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/les-effets-dans-le-temps-des-decisions-qpc).

[108] See https://www.treccani.it/enciclopedia/retroattivita-della-legge-penale-piu-favorevole_%28Il-Libro-dell'anno-del-Diritto%29/.

[109] ECtHR, *Scoppola v. Italy (No 2)* (No 10249/03, EC:ECHR:2009:0917JUD 001024903).

[110] Ibid., paragraph 109.

the Corte costituzionale held that, in the procedure for adapting the domestic legal order to the ECHR, a conviction which has acquired force of *res judicata* did not constitute an insurmountable obstacle limiting the effects of the obligation to comply with cases still pending.

77. According to academic lawyers, the approach taken by the Corte costituzionale should also be applied to other, structurally very similar, scenarios opened up by recent judgments of unconstitutionality. [111] The underlying assumption seems to be a finding (by the Corte costituzionale itself, or by the ECtHR or the Court of Justice of the European Union) that the criminal law applied by the trial court is unlawful, either in whole or in part, an unlawfulness that affects the enforcement stage, rendering enforcement of the sentence itself unlawful until the unlawfulness is brought to an end or the law is at least duly amended to ensure it is lawful.

78. A distinction must also be drawn between the approach taken in the judgment in *Scoppola v. Italy* and criminal provisions concerning a series of merely amending laws, since the legislature's decision to amend *in mitius* the criminal processing of a category of acts that still constitutes an offence does not necessarily mean that the previous criminal processing has been found unlawful but merely a finding that it is inappropriate given the changed historical context. Whether the rule of the inviolability of judgments in similar situations should be maintained *de iure condendo* can therefore be debated but enforcement of a sentence imposed by a court on the basis of legislation subsequently held to be inappropriate – but not unlawful – cannot be described as unlawful.

C. Invalidation of criminal provisions in legal systems with no constitutional court

79. Lastly, as regards Member States with no constitutional court, it should be noted that, in the **Netherlands**, constitutional case-law that has invalidated or disapplied a national criminal provision cannot be regarded as a more favourable criminal law (*lex*) capable of triggering the application of the *lex mitior* principle. In **Sweden**, if a court finds that a provision is contrary to the Constitution, that finding has only *inter partes* effect and intervention by the legislature is necessary to give it *erga omnes* effect. In **Greece**, the assembly of the Court of Cassation ruled that a more favourable criminal provision should remain disapplied on grounds of unconstitutionality because it concealed an amnesty in disguise and therefore applied the less favourable law to the accused. [112] On the other hand, the assembly of the Court of Cassation held that a criminal provision laying down a specific limitation period for an offence was not contrary to the Constitution and therefore applied the more lenient law allowing the criminal proceedings to be brought to an end. [113]

Conclusion

80. Analysis of the **thirteen legal systems** studied shows that the *lex mitior* principle is recognised as an essential principle of criminal law. Of these legal systems, the **Irish** system is the only one that does not recognise the principle.

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[111] See, to that effect, judgment of the Corte costituzionale (Constitutional Court, Italy) of 23 March 2012 No 68 finding Article 630 of the Criminal Code unconstitutional because it does not provide for the applicability to the offence of abduction for the purposes of extortion of mitigating circumstances as laid down for abduction for the purposes of terrorism or subversion in Article 311 of that code.

[112] ΑΠ (ΟΛΟΜ-Ποιν.)(Court of Cassation, assembly of criminal court judges) 3/2016, apofasi tis 16.11.2016, available on Nomos; Βενιζέλος Ε., *op.cit.*, p. 269, available at sakkoulas-online.

[113] ΑΠ (ΟΛΟΜ-Ποιν.)(Court of Cassation, assembly of criminal court judges) 11/2001, apofasi tis 10.7.2001, available on Nomos.

81. Despite a broadly similar framework surrounding the *lex mitior* principle in the Member States under consideration (with the exception of **Ireland**), the approach taken as regards the applicability of this principle to final criminal convictions currently being enforced is not unanimous. **Eight States** (**Belgium**, **Bulgaria**, **France**, **Germany**, **Greece**, **Italy**, the **Netherlands** and **Sweden**) have a general rule excluding final criminal convictions currently being enforced from the scope of the *lex mitior* principle. However, in some of those States, application of that general rule is qualified and at times subject to reservations, in particular in relation to the distinction made between *abolitio criminis* and *abrogatio sine abolitio* (**France**, **Italy** and **Greece**) or to the possibility of specific remedies (**Germany**, the **Netherlands** and **Sweden**). In **four States** (**Lithuania, Poland, Portugal** and **Spain**), application of the *lex mitior* principle to final criminal convictions is expressly recognised.

82. In all the Member States considered that recognise the existence of the *lex mitior* principle, legislative intervention is required to trigger application of the principle. Thus, the case-law per se is not regarded as *lex mitior*. Moreover, in most of those States (**Belgium, Bulgaria, France, Germany, Greece,** the **Netherlands, Poland, Portugal** and **Spain**), the *lex mitior* principle applies only to substantive criminal law and amendments to procedural rules are excluded from its scope. In **Italy** and **Lithuania**, however, procedural rules are included within that scope.

83. In most of the legal systems analysed, judgments finding a law to be unconstitutional have *erga omnes* effects and entail its invalidation and removal from the legal order. Only in States with no constitutional court (**Greece,** the **Netherlands** and **Sweden**) do court judgments finding a provision contrary to the Constitution have solely *inter partes* effect. In the first case, the effects of a finding of unconstitutionality are similar to a legislative amendment that triggers the application of the *lex mitior* principle. Note that it is the removal of the earlier law and not the judgment in itself that triggers the application of the principle.

[…]