

The principle of ‘lex mitior’ in the case-law of the Hungarian Constitutional Court

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Abstract: *The principle of ‘lex mitior’ is different from that of the ‘nullum crimen sine lege, nulla poene sine lege’ or ‘ex post facto’. In contrast with the ‘ex post facto’ doctrine, the ‘lex mitior’ principle provides for retroactivity by mandating that criminal defendants receive the retroactive benefits of repealing statutes that either decriminalize conduct altogether or reduce punishments for it. Even though the ‘lex mitior’ principle is more modern and therefore much less embedded in the constitutional tradition than the ‘ex post facto doctrine’, the Hungarian Constitutional Court soon recognized it as an inherent part of the rule of the law.*

Rezumat: *Principiul “lex mitior” este diferit de “nullum crimin sine lege, nulla poene sine lege” sau “ex post facto”. Spre deosebire de doctrina “ex post facto”, principiul “lex mitior” prevede retroactivitatea, stabilind ca inculpații să beneficieze de avantajele retroactive care fie dezincriminează comportamentul în totalitate, fie reduc pedepsele pentru acesta. Chiar dacă principiul “lex mitior” este mai modern și, prin urmare, mult mai puțin încorporat în tradiția constituțională decât “doctrina ex post facto”, curtea constituțională maghiară a recunoscut-o curând ca o parte inerentă a statului de drept.*

Keywords: *retroactivity principle in criminal matters, unconstitutional law, criminal liability*

General outline on the principle of ‘lex mitior’ or the ‘milder law’ considering the case-law of the Hungarian Constitutional Court

The limitation of retroactivity both in criminal as well as in other areas of the law has always been a cornerstone of the rule of law principle in the eye of the Hungarian Constitutional Court [see, e.g. Decision of the HCC 9/1992. (I. 30.) and Decision of the HCC 38/2012. (XI.

14.)]. According to the interpretation of the Constitutional Court, the limitation of retroactivity has a dual source in the text of the constitution.

On the one hand, Article B, paragraph 1 of the Fundamental Law, a provision that is identical with Article 2, paragraph 1 of the constitution that was in force between 1989 and 2011, contains the rule of law clause. According to the established case-law of the Constitutional Court, the

principle of foreseeability and settled expectation of the law is one of the major constitutional requirements that rolls out of the rule of law clause. The limitation and exceptionality of retroactive legislation is part of the foreseeability principle, and thus it is one of the building blocks of the rule of law clause that imposes a standard on the entire legal system. This constitutional provision prohibits the legislature from adopting a regulation that imposes additional obligations or makes a conduct unlawful before the time of entering into force, that is creating more burdensome circumstances (*ad malem partem*) [see, e.g. Decision of the HCC 110/2009. (XI. 18.); Decision of the HCC 16/2014. (V. 22.) and Decision of HCC 10/2018. (VII. 18.)]. In its long-established case-law, the Constitutional Court regards the principle of the limitation of retroactivity as a fundamental right to which people can refer before the Constitutional Court. Although the principle is far from being absolute and therefore it is subject to several exceptions.

On the other hand, Article XXVIII, paragraph 4 of the Fundamental Law, a provision that is identical with Article 57, paragraph 4 of the constitution that was in force between 1989 and 2011 embraces the doctrine of 'ex post facto' prohibition, also known by the Latin phrase '*nullum crimen sine lege, nulla poena sine lege*'. The *ex post facto* doctrine prohibits retroactivity by prohibiting the legislature from prosecuting persons under criminal statutes that either retroactively criminalize conduct that was hitherto lawful or retroactively increase penalties for conduct that, while unlawful all along, was hitherto punishable less severely. This is such a venerable and fundamental principle of the criminal justice system that the Constitutional Court equates it with 'legality' itself [see, e. g. Decision of the

HCC 11/1992. (III. 5.)]. Based on this principle, the Constitutional Court applies this standard to every relevant provision of the criminal liability [see, e. g. Decision of the HCC 16/2014. (V. 22.)].

The principle of 'lex mitior' is different from that of the '*nullum crimen sine lege, nulla poene sine lege*' or 'ex post facto'. In contrast with the 'ex post facto' doctrine, the 'lex mitior' principle provides for retroactivity by mandating that criminal defendants receive the retroactive benefits of repealing statutes that either decriminalize conduct altogether or reduce punishments for it. Even though the 'lex mitior' principle is more modern and therefore much less embedded in the constitutional tradition than the 'ex post facto doctrine', the Hungarian Constitutional Court soon recognized it as an inherent part of the rule of the law [see, e. g. Decision of the HCC 11/1992. (III. 5.)] and this concept was reinforced in several occasions throughout the last decades [see, e. g. Decision of the HCC 29/2000. (X. 11.), Decision of the HCC 38/2012. (XI. 14.), Decision of the HCC 16/2014. (V. 22.)]. Conceiving 'lex mitior' as a constitutional command rather than just a statutory doctrine was at the cutting-edge of constitutional guarantees since the European Court of Human Rights (ECtHR) only recognized it as an implicit part of Article 7 of the European Convention of Human Rights in 2009 {ECtHR, *Scoppola v. Italy* [No.2.; GC], (10249/03), September 17, 2009., para104.}. 'Lex mitior' now enjoys widespread treaty protection not only under Article 7 of the ECHR but also under Article 15 of the International Covenant on Civil and Political Rights and under Article 49 of the European Union's Charter of Fundamental Rights. Since Hungary is a contracting state of every one of these international treaties, the Constitutional Court is required to interpret Article XXVIII, paragraph 4 of the

Fundamental Law in a way to include the 'lex mitior' principle and to follow the rule of lenity.

1. If a criminal law is passed does the unconstitutional character of the law, established by a decision of the Constitutional Court, represent an impediment for the mitior lex principle?

There is neither domestic case-law, nor any example for a situation in which the unconstitutionality of a more lenient rule would have influenced the 'lex mitior' principle because the Constitutional Court has not declared more lenient criminal regulation unconstitutional thus far. Theoretically, the response to this question would depend on the temporal effects of the judgment of the Constitutional Court. If the Constitutional Court decides to annul a more lenient criminal regulation with retroactive effect as of the date of its promulgation (*ex tunc*) [see, Article, 45 paragraph 4 of the Act no. CLI. of 2011 of the Constitutional Court], the 'lex mitior' principle will not prevail. However, if the Constitutional Court decides otherwise on the temporal scope of the annulment and the more lenient regulation is annulled on the day after the publication of the Constitutional Court's decision (*ex nunc*) or at some time in the future (*pro futuro*), the more lenient regulation might prevail according to the general statutory provisions. One must also take into account Article 45, paragraph 3 of the Act no. CLI. of 2011 of the Constitutional Court that says '[a]part from the case set forth in paragraph (6), the annulment of the legal regulation does not affect the legal relations originating on the day or before the decision was published and the rights and obligations resulting therefrom.' While paragraph 6 of the same Article says: '[t]he Constitutional Court shall order the review of the criminal proceedings or

contravention proceedings concluded with a final decision based on a legal regulation which is contrary to the Fundamental Law, if the annulment of the applied legal regulation or provision therein would result in the reduction or waiver of the punishment or measure or in the exemption from or limitation of criminal or contravention liability'. This specific regulation relates to the unconstitutionality of a criminal provision that already led to a more severe criminal liability. In contrast to this provision, if a regulation in question resulted in a milder criminal liability, there would be no place for a such a review.

2. Can you consider that an unconstitutional law can be seen as a valid legal norm in the view of the principle of mitior lex? Can you apply the principle, in view of the unconstitutional law, for crimes committed before this law passed?

Referring to the above response as well as to Article 45 on the Act no. CLI. of 2011 of the Constitutional Court, the more lenient but unconstitutional provision might prevail depending on the temporal scope of the decision of the Constitutional Court. The more lenient criminal law cannot be applied in cases when the crimes had been committed before this law entered into force, because, according to the statutory principle, only two dates are relevant when applying the 'lex mitior' principle: the time when the crime was committed, and the time when the judgment was made.

3. Can a criminal unconstitutional law be regarded as a basis for the retroactivity principle in criminal matters? Can you draw any effects in criminal matters from a law that is declared unconstitutional? Does the effects of an unconstitutional law in view of the mitior lex principle differ in

regard of the reason that makes the law unconstitutional (legislative process, the way the law was created or adopted, the content of the law, the legislative body that enacted the law – parliament or government)?

Referring to the above answers as well as to Article 45 paragraph 6 on the Act no. CLI. of 2011 of the Constitutional Court, '[t]he Constitutional Court shall order the review of the criminal proceedings or contravention proceedings concluded with a final decision based on a legal regulation which is contrary to the Fundamental Law, if the annulment of the applied legal regulation or provision therein would result in the reduction or waiver of the punishment or measure or in the exemption from or limitation of criminal or contravention liability.' Consequently, the unconstitutionality of a criminal law will serve as a basis of the retroactivity principle only if it results in a more lenient outcome in terms of the criminal liability. In this scenario, the consequence of declaring a criminal provision unconstitutional is the mandatory review of each criminal proceeding in which this provision was applied. The underlying reasons of the unconstitutionality do not influence the legal consequences. However, if the reason of the unconstitutionality is not rooted in the content of the regulation, the legislature will not be restricted to adopt the regulation once again.

4. Can you consider a law that is adopted with an illicit scope as mitior lex?

There is neither domestic case-law, nor any example for a such a situation, the same answer applies here as well.

5. Can you consider a law that is adopted fraudulently, in favour of a representative of the legislative body, as a mitior lex?

There is neither domestic case-law, nor any example for such a situation, the same answer applies here as well.

6. Does the illicit scope of the law have any influence on the effects that the said law produces for past or/and future events?

There is neither domestic case-law, nor any example for a such a situation, the same answer applies here as well.

7. Does the mitior lex principle apply in the case of extended confiscation legal provisions? Does it depend on the national rules regarding the way extended confiscation is seen as a criminal law provision or as a procedural law provision?

Unless the more lenient regulation relates to the rules of confiscation themselves or to a decriminalization, the 'lex mitior' principle does not have any effect on the confiscation since it is a distinct legal consequence.