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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION
ON THE DRAFT AMENDMENTS OF FEBRUARY 2009
TO THE CRIMINAL CODE
OF ARMENIA**

**On the basis of comments by
Mr James HAMILTON (substitute member, Ireland)
Mr Guido NEPPI MODONA (substitute member, Italy)**

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. Introduction

1. Armenia committed itself to amending articles 225 and 300 of the criminal code in order to meet its obligations under PACE Resolutions 1609 (2008) and 1620 (2008).

2. On 22 January 2009, the Speaker of the National Assembly of Armenia established a Working Group within the National Assembly in order for it to draft, within a one-month period, in co-operation with the relevant bodies of the Council of Europe (notably the Venice Commission and the Commissioner for Human Rights) amendments to Articles 225 and 300 of the Criminal Code of Armenia (see PACE Resolution 1643 (2009), § 6).

3. Mr Davit Harutyunyan, chairman of the said working group, promptly requested the assistance of the Venice Commission. Mr Hamilton, who acted as rapporteur, met with Mr Harutyunyan in Tbilisi on 2 February 2009 in order to discuss this matter.

4. A comparative research on similar provisions in other European countries was carried out by the Venice Commission secretariat and promptly forwarded to Mr Harutyunyan.

5. On 19 February 2009, Mr Harutyunyan requested the opinion of the Venice Commission on the draft amendments to the criminal code of Armenia (CDL(2009)040) submitted by his working group to parliament. His request further contained four questions:

“Question 1. Let us assume that the above mentioned sections of Article 225 enter into force during a criminal trial in the court. In case if the described situation takes place in your country, what would be the subsequent steps?”

For instance:

- a. The prosecutor or the court would bring the accusation in the crime in conformity with the new definition and the hearing of the case will continue.*
- b. The prosecutor would drop the charge because of the mere fact that the definition of the in the criminal code was amended, and the persons being accused will be acquitted.*
- c. The accusation would continue in accordance with the old definition.*

Question 2. What should be the situation with the persons already convicted for the subject crimes at the time when the above mentioned sections of Article 225 entered into force?

Question 3. In your opinion, may Article 225 after the mentioned amendment be considered as a new “criminal offence which did not constitute a criminal offence under national law” before the amendment (in the terms of Article 7 of the ECHR).

Question 4. May we say that in case of amendments to the Criminal Code there should be a general rule that any action committed may be prosecuted if:

- a. it was considered as a crime before changes, AND*
- b. is also considered as a crime after the changes.*

6. Mr Harutyunyan asked the Venice Commission’s opinion also on the amendments to Article 225 §§ 1, 2 and 4, which his Working Group had proposed but parliament had failed to accept.

7. On 26 February 2009, the Armenian parliament adopted the draft amendments in first reading.

8. *The present opinion, which was prepared on the basis of comments by Messrs Hamilton and Neppi Modona, was sent to the Armenian authorities on 5 March 2009 and was subsequently endorsed by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. Background information

9. The amendments under consideration mainly concern three provisions of the criminal code of Armenia: Article 225 on “Mass Disorder”, which reads:

1. *Organization of mass disorder, accompanied with violence, pogroms, arson, destruction or damage to property, using fire-arms, explosives or explosive devices, or by armed resistance to the representative of the authorities, is punished with imprisonment for the term of 4 to 10 years.*

2. *Immediate implementation of actions envisaged in part 1 of this Article, is punished with imprisonment for the term of 3 to 8 years.*

3. *Active disobedience to the representative of authorities during mass disorder, or calls for violence against people or for mass disorder, is punished with a fine in the amount of two hundred to six hundred of the minimum salary or detention of maximum two months, or maximum three years of imprisonment;*

Article 300 on “Usurpation of State power”, which reads:

1. *Usurpation of the State power - actions directed towards violent takeover of the State power or towards its violent retaining in breach of the Constitution of the Republic of Armenia, as well as actions directed towards violent overturning of the constitutional order of Republic of Armenia or towards violent infringement of the territorial integrity of the Republic of Armenia shall be punishable by deprivation of liberty for a term of ten to fifteen years.*

2. *The person having voluntarily informed the governmental bodies about the actions mentioned in this Article shall be released from criminal liability if in result of measures taken pursuant to such informing the implementation of the respective actions has been prevented.*

and Article 301 on “Public calls directed towards violent change of the constitutional order of the Republic of Armenia” which reads:

Public calling directed towards violent takeover of the State power, violent changing of the constitutional order of the Republic of Armenia shall be punishable by a fine amounting from three hundred to five hundred minimum wages or by arrest for a term of two to three months or by deprivation of liberty for a maximum term of three years.

10. The Venice Commission had previously looked into Article 301 and 225 of the Armenian criminal code. Indeed, at the request of the Human Rights Defender of Armenia, the Commission had first assessed Article 301 in the light of the applicable European standards (notably Article 10 of the European Convention on Human Rights) and had concluded that that provision did not appear to be incompatible with the ECHR “provided that it is properly interpreted and used”. (CDL-AD(2007)043).

11. The Commission was subsequently called by the Armenian National Assembly upon assessing certain draft amendments to article 301 and to paragraph 1 of Article 225 of the criminal code of Armenia. The Commission considered that the proposed amendments were overbroad and open to abuse, and recommended not to adopt them (CDL-AD(2008)017).

12. The Commission underlines that the main purpose of the amendment of the provisions under consideration is not to so much that of bringing them into compliance with European standards (the Commission has found in particular that Article 301 is not at variance with these standards), but rather to elaborate them in greater detail in order to reduce the risk of their abusive interpretation.

13. In particular, these amendments pursue a specific objective in the short term. Following the events of 1 and 2 March 2008 (clashes on the occasion of demonstrations against the results of the presidential elections, resulting in the death of 10 people), 28 persons have been charged under article 300, including seven opposition activists, whose cases have been recently brought before the court and who are considered by the authorities to be the “ring-leaders” of the events of 1 and 2 March. In total 79 persons have been charged under article 225, 19 of whom under 225-3, including the abovementioned 7.

14. The Armenian parliament intends to amend Articles 225, 300 and other related provisions in order to make them more narrowly construed and clearer. To the extent that these amendments render the provisions in question more favourable to the accused, once they enter into force they will apply retrospectively to the charges against the seven opposition activists by virtue of Articles 22 and 42 of the Armenian Constitution, which read:

Article 22

No one shall be obliged to testify about himself/herself, his/her spouse or close relatives.

The law may prescribe other cases of release from the obligation to testify.

The use of illegally obtained evidence is prohibited.

Imposing of a heavier punishment than the one prescribed by the law in effect at the time when the crime was committed shall be prohibited.

No one shall be held guilty for a crime on account of any act which did not constitute a crime under the law in effect at the time when it was committed.

The law eliminating or mitigating the punishment for the offence shall be retroactive.

The law prescribing or increasing liability shall not be retroactive.

No one shall be tried twice for one and the same act.

Article 42

The fundamental human and civil rights and freedoms stipulated in the Constitution shall not exclude the other rights and freedoms prescribed by laws and international treaties.

Everyone shall have the right to act in a way not prohibited by the law and not violating others' rights and freedoms. No one shall bear obligations not stipulated by the law.

The laws and other legal acts exacerbating the legal status of an individual shall not be retroactive.

The legal acts improving the legal status of an individual, eliminating or mitigating his/her liability shall be retroactive if prescribed by the acts in question.

III. Analysis of the proposed amendments

a) Article 300 – Usurpation of Power.

15. The proposed amendments appear to be acceptable. They duly provide for distinct criminal offences of seizing power and holding power. The fact of having informed the authorities about the prospected criminal actions before they take place becomes a defence, irrespective of whether such information results in the actions being prevented, which is positive.

b) Article 300.1 – Overthrow of the Constitutional Order.

16. This new provision, which complements the previous one and holds as a separate offence the overthrow of the constitutional order, also appears acceptable. It appropriately foresees a defence of having informed the authorities irrespective of whether such information results in the actions being prevented

c) Article 300.2 – Violation of territorial integrity.

17. This new provision presents, in the English text, an ambiguity: is it confined to forcible or violent secession or transfer? It should be spelled out clearly that the words “through violence” govern all of the text and not merely transfer (as distinct from secession). People must be free to advocate transfer or secession by peaceful means.

d) Article 301 – Public calls.

18. This provision should be confined to calls to commit these acts by the use of violence, force or unlawful means.

e) Article 301.1 – Coercion.

19. This new provision introduces a new criminal offence, that of coercion against the President, the National Assembly, the Government and the Constitutional Court; it is sanctioned less severely than usurpation of state power, in that the violence is not aimed to seize power. The provision seems to be in order, although the sentence (three to fifteen years) appears rather severe.

f) Article 225 – Mass Disorder.

20. The abrogation of paragraph 3 is to be welcomed. Indeed that paragraph provides for an aggravating circumstance which is not dependent on the wilful intent to cause death. Wilful murder committed during mass disorders is now foreseen in Article 104 (see para. 23 below).

21. In paragraph 5, a knowledge or intent to participate in an act of mass disorder should be required, for instance using the wording “Conscious participation in mass disorders”. The provision that a person who leaves when the event becomes disorderly is not liable is to be welcomed, although it may not always be easy to ascertain whether he or she left before or after a peaceful demonstration turned into mass disorder.

g) Article 225.1 – Organization of Public Event.

22. To the extent that paragraph 2 refers only to a lawful demand of the police, this provision appears to be in order.

h) Article 104 – Murder.

23. This provision seems to be acceptable. “Fanatism” should read “Fanaticism.”

IV. Replies to the four queries

A. General considerations

24. The questions put by Mr Harutyunyan to the Venice Commission are to be examined within the framework of the principle *lex posterior derogat priori* against the background of the general principle of legality in criminal law. Fundamental corollaries to the legality principle are the irretroactivity of incriminating criminal provisions (that is, the prohibition of retroactivity *in malam partem*) and the retroactivity of more favourable criminal laws (retroactivity *in bonam partem*).

25. Article 7 of the European Convention on Human Rights reads:

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

26. Article 7 ECHR does not entitle an accused person to the benefit of a change in the law which has occurred between the commission of the offence and the trial. In this respect, it differs from the Article 15 (1) ICCPR which expressly requires the accused to be given the benefit of any subsequent change in his favour in relation to the applicable penalty¹.

27. However, while Article 7 prohibits the retroactive application of the criminal law to an accused's disadvantage, it does not prevent the retroactive application of the criminal law *in bonam partem*.²

28. The Armenian constitution contains both the prohibition of the retroactive application of criminal law *in malam partem* and the principle of the retroactive application of criminal law *in bonam partem* (see para. 14 above). What needs to be seen is therefore whether the proposed new wording of Article 225 may be qualified as being “more favorable to the accused” and to what extent it can be applied retrospectively.

29. The principle of retroactivity of the more favorable criminal law does not only refer to the case in which the posterior criminal law provides that a certain act no longer constitutes a criminal offence or is punished with a less severe sentence. It also refers to any case in which the posterior law is in any manner more favourable to the accused person, for example when it

¹ Article 15 § 1 of the International Covenant on Civil and Political Rights reads: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. (...)”

² See ECtHR, *G.C. v. France* judgment of 27 September 1995, §§ 22-27

better guarantees the legality principle and allows for a clearer and surer definition of the offence, notably of its constitutive elements, thus reducing the overbroad discretionality or the possibility of arbitrariness of the Public prosecutor or the judge in the application of the criminal provision at issue.

30. The current article 225 § 1 of the Armenian criminal code (see para. 9 above) criminalises “mass disorders accompanied by violence” but does not provide a definition of “mass disorder” and fails to clarify what link – in space or in time - must exist between the “mass disorder” and the “violence, pogroms, arson, destruction or damage to property”. Paragraph 2 of the same article is vague and ambiguous, to the extent that the expression “immediate implementation of actions envisaged in para. 1” should more clearly refer to the conduct of the person who has committed violent acts without having organised the disorder.

31. While only the abrogation of paragraph 3 and the insertion of a new paragraph 5 have been adopted by parliament in first reading, the Working Group has proposed amendments also to the other paragraphs of Article 225:

1 Organization of mass disorders, that is group acts expressed in violence, pogroms, arsons, destruction or damage of property, use of firearms, explosives or explosive devices or armed resistance to a representative of authorities and threatening to public safety, shall be punished with four to ten years of imprisonment.

2 Use of violence, exercise of pogroms or arson, destruction or damage to property, use of firearms, explosives or explosive devices or armed resistance to a representative of authorities by a participant during mass disorders shall be punished with three to eight years of imprisonment, if committing these acts does not entail a more severe responsibility under other articles of this code.

4. Calls directed to abetting mass disorders, as well as calls to active disobedience to the lawful demand of the representative of the authorities or violence against people during mass disorders shall be punished with a fine in the amount of two hundred to six hundred of the minimum salary or detention of maximum two months, or maximum three years of imprisonment.

32. The proposed amendments to paragraph 2 are in conformity with the legality principle, as they set out sure, clear and precise constitutive elements of the offence. Paragraph 1 defines the notion of “mass disorder”, that is collective acts of violence, arson etc.; while paragraph 2 clarifies the relation between the mass disorders and the acts of violence, which must be committed during the disorders by a person who took part in the disorders without having organised them. Obviously, paragraph 1 requires, according to the general rules of the criminal liability, either intent to cause mass disorder as defined, or knowledge that the event will involve mass disorder; this should perhaps be indicated explicitly.

33. The proposed amendment to paragraph 4 sets out in more detail the offences which are currently foreseen in paragraph 3 of Article 225. The calls, which are presumably acts of incitement, instigation, and solicitation, however remain undeterminate and vague, so that it would seem preferable, for the legality principle sake, to delete this paragraph altogether.

34. The penalties incurred for these offences are not modified.

35. The more favourable character of the proposed amendments to Article 225 consists in the clearer and more sure definition of the constitutive elements of the offence, hence in the better guarantee that the prosecutor or the judge will be unable to interpret the provision in an excessively discretionary or arbitrary manner. The main guarantee of the legality principle is that it allows every person to foresee in a clear and precise manner what conducts are

prohibited. The more in detail the criminal law defines the constitutive elements of an offence, the lesser the risk that the public prosecutor or the judge arbitrarily stretch the interpretation of that offence. The more the offence is vague and undetermined, the greater the risk that it be used for undue repression and political discrimination.

B. Replies to the specific questions

Question 1:

Let us assume that the above mentioned sections of Article 225 enter into force during a criminal trial in the court. In case if the described situation takes place in your country, what would be the subsequent steps?

For instance:

- a. The prosecutor or the court would bring the accusation in the crime in conformity with the new definition and the hearing of the case will continue.*
- b. The prosecutor would drop the charge because of the mere fact that the definition of the in the criminal code was amended, and the persons being accused will be acquitted.*
- c. The accusation would continue in accordance with the old definition.*

36. In countries where there is a right to the retrospective application of criminal law *in bonam partem* country like Italy or Armenia³, the case would continue under the new law provided, of course, that the new law is to the accused's advantage (which in the Commission's view is the case for the proposed new version of Article 225: see para. 35 above). It is up to the public prosecutor and the judge to assess whether, under the new, more favourable provision, the accused is to be convicted or acquitted. Obviously the new law could not be applied if, through the amendment of the substance of the offence, it would result in the criminalisation of a conduct which was not caught by the original criminal provision: in that case, the trial would continue under the old law.

37. The case would only be closed if the new law abrogated the old one, and not if it merely amended it.

38. In Ireland, in case of changes to the substance of the law, the case would likely continue under the old law, although in theory it would be possible to legislate retrospectively to limit the scope of an offence (e.g. by providing for a defence not previously available or requiring the prosecutor to establish some additional element; a provision could for example be added, saying "A person shall not be convicted of an offence under section X unless it is shown that at the time of the offence etc" or alternatively "It shall be a defence to a prosecution under section x to show that etc." In other words, the new offence would be a restricted version of the old, and no conduct would be criminalized which was not criminal when it was committed). In case of a reduction of the penalty, the new law would instead apply. Where a law is repealed this is usually done without prejudice to the continuance of proceedings (civil or criminal) already in being.

³ Article 22 of the Armenian Constitution ; Article 2 of the Italian criminal code. For further examples of constitutions and criminal codes providing for the principle of retroactive application of the more favourable criminal law see the Annex to this opinion.

Question 2:

What should be the situation with the persons already convicted for the subject crimes at the time when the above mentioned sections of Article 225 entered into force?

39. To the extent that the new law only amends and does not repeal the old law, their convictions (if final) would stand irrespective of whether or not there exists in the country a principle of retrospective application of the more favourable criminal law.

40. If, instead, new Article 225 repealed the old provision, in countries like Armenia and Italy even final convictions would be annulled.⁴

Question 3:

In your opinion, may Article 225 after the mentioned amendment be considered as a new "criminal offence which did not constitute a criminal offence under national law" before the amendment (in the terms of Article 7 of the ECHR) ?

41. Article 7, which is an essential element of the rule of law, aims at the provision of effective safeguards against arbitrary prosecution, conviction and punishment⁵. Its importance is indicated by the fact that no derogation is possible under Article 15 ECHR. It embodies the general principle that offences must be based in law, and that an individual should be able to know from the wording of the relevant provision, and if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

⁴ Article 12 of the Armenian criminal code reads: Operation of the criminal law in time .

1. The criminality and punishability of the act is determined by the acting criminal law at the time of committal of the offence.

2. The time of committal of crime is the time when socially dangerous action (inaction) was committed, regardless when the consequences started to take effect.

Article 13 reads: Retroactive effect of criminal law.

1. The law eliminating the criminality of the act, mitigating the punishment or improving the status of the criminal in any way, has retroactive effect, i.e., this law is extended to the persons who committed this act before this law had taken effect, including those persons who are serving the punishment or served the punishment, but have a record of conviction.

2. The law stipulating the criminality of the act, making the punishment more severe or worsening the status of the criminal in any other way, has no retroactive effect.

3. The law partially mitigating the punishment and, in the meantime, partially making the punishment more severe has retroactive effect only in respect to the part which mitigates the punishment.

Article 2 § 2 of the Italian criminal code provides : "No one may be punished for an act which according to a posterior law does not constitute a criminal offence, and if there has been a conviction its enforcement and its effects must cease". Para. 4 reads " If the law in force at the time of the committed crime and the subsequent law are different, the more favourable law is enforced only when the final decision has not yet been delivered". See also Article 3 of the Albanian criminal code.

⁵ See ECtHR, SW v. UK judgment of 22 November 1995, § 34: "the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 (art. 15) in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.

42. Article 7 creates a non-derogable prohibition on the retroactive application of the criminal law. The European Court of Human Rights has clarified that⁶

“Article 7 embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy”.

43. As was said above (see paras. 24-25 above) unlike Article 15(1) ICCPR, Article 7 does not entitle an accused person to the benefit of an alteration in the law which has occurred between the commission of the offence and the trial but does not prevent the retroactive application of more favourable criminal provisions⁷.

44. The retroactive application of the new Article 225 would not be in breach of Article 7 ECHR if it would clearly result in a more favourable situation for the accused (which in the Commission’s view appears to be the case). The use of formulas such as that suggested in paragraph 38 above would certainly avoid this risk.

Question 4:

May we say that in case of amendments to the Criminal Code there should be a general rule that any action committed may be prosecuted if:

- a. it was considered as a crime before changes, AND*
- b. is also considered as a crime after the changes.*

45. In conformity with the principle of *lex posterior derogat priori*, in order to be able to pursue the prosecution of acts carried out before the amendments were passed and while the old law was still in force, it is necessary that the acts be considered to constitute a crime both by the old and by the new law.

46. However, in pursuance of the prohibition of creation of retrospective offences, the new law will only be applied if it is more favourable to the accused person: if it is not, then the old law will continue to apply. .

⁶ See ECtHR, *Kokkinakis v. Greece* Judgment of 25 May 1993, § 52

⁷ See ECtHR, *G.C. v. France* judgment of 27 September 1995, §§ 22-27

ANNEX

European provisions of constitutions or criminal codes providing for the principle of retroactivity of the more favourable law

ALBANIA

Constitution, Article 29

1. No one may be accused or declared guilty of a criminal offense that was not provided for by law at the time of its commission, with the exception of offenses, which at the time of their commission constituted war crimes or crimes against humanity according to international law.
2. No punishment may be given that is more severe than that which was contemplated by law at the time of commission of the criminal offense.
3. A favorable criminal law has retroactive effect.

Criminal Code, Article 3. Operation in time of the criminal law

1. No one may be sentenced for an act that, according to the law into power at the time it was committed, did not constitute a criminal act.
2. A new law that does not incriminate a criminal act has retroactive effect. If the person has been sentenced, the enforcement of the sentence shall not commence and, if it has commenced, it shall cease.
3. If a law in force at the time when a criminal act has been committed differs from a subsequent law, the law whose provisions are more favorable to the person who has committed the criminal act shall apply

ANDORRA

Constitution, Article 9 § 4

No one shall be held criminally or administratively liable on account of any acts or omissions which were lawful at the time when they were committed.

Criminal Code, Article 5

La loi pénale n'a pas d'effet rétroactif, mais si la loi applicable au moment de la commission du délit est distincte de celle en vigueur au moment de la condamnation ou pendant la période intermédiaire, la loi la plus favorable à l'accusé sera appliquée.

ARMENIA

Constitution, Article 22

No one shall be obliged to testify about himself/herself, his/her spouse or close relatives.

The law may prescribe other cases of release from the obligation to testify.

The use of illegally obtained evidence is prohibited.

Imposing of a heavier punishment than the one prescribed by the law in effect at the time when the crime was committed shall be prohibited.

No one shall be held guilty for a crime on account of any act which did not constitute a crime under the law in effect at the time when it was committed.

The law eliminating or mitigating the punishment for the offence shall be retroactive.

The law prescribing or increasing liability shall not be retroactive.

No one shall be tried twice for one and the same act.

Constitution, Article 42

The fundamental human and civil rights and freedoms stipulated in the Constitution shall not exclude the other rights and freedoms prescribed by laws and international treaties.

Everyone shall have the right to act in a way not prohibited by the law and not violating others rights and freedoms. No one shall bear obligations not stipulated by the law.

The laws and other legal acts exacerbating the legal status of an individual shall not be retroactive.

The legal acts improving the legal status of an individual, eliminating or mitigating his/her liability shall be retroactive if prescribed by the acts in question.

Criminal Code, Article 12 Operation of the criminal law in time

1. The criminality and punishability of the act is determined by the acting criminal law at the time of committal of the offence.
2. The time of committal of crime is the time when socially dangerous action (inaction) was committed, regardless when the consequences started to take effect.

Criminal Code, Article 13. Retroactive effect of criminal law.

1. The law eliminating the criminality of the act, mitigating the punishment or improving the status of the criminal in any way, has retroactive effect, i.e., this law is extended to the persons who committed this act before this law had taken effect, including those persons who are serving the punishment or served the punishment, but have a record of conviction.
2. The law stipulating the criminality of the act, making the punishment more severe or worsening the status of the criminal in any other way, has no retroactive effect.
3. The law partially mitigating the punishment and, in the meantime, partially making the punishment more severe has retroactive effect only in respect to the part which mitigates the punishment.

AUSTRIACriminal Code, §§ 1, 2 No punishment without law

- (1) A punishment or a preventive measure may be imposed only because of an act, which falls under an express legal threat of punishment and which was already threatened by punishment at the time of the commission of the act
- (2) No heavier punishment may be imposed than that foreseen at the time of commission of the act.

Criminal Code, § 61 Temporal validity

Criminal penal laws are only applicable to acts, which were committed after their entry into force. They shall be applied to an act committed before, if the laws which were valid at time of the commission of the act, were not more favorable to the author of the act in their entire effect.

AZERBAIJANConstitution, Article 71. Protection of rights and liberties of a human being and citizen

(...)

VIII. No one will be responsible for acts which were not considered criminal at the moment of their implementation. If after the crime new law was introduced envisaging no responsibility or mitigation of responsibility, said new law shall apply.

Criminal Code, Article 10. Action of the criminal law in time

10.1. The criminality and punish of action (action or inaction) shall be determined by the criminal law, exercised during commitment of this action (action or inaction). No one shall be applied to criminal liability for action, which was not admitted as a crime at the time of committing it.

10.2. Time of committing socially dangerous action (action or inaction) shall be time of committing a crime irrespective on time of approach of consequences.

10.3. The criminal law, which shall eliminate criminality of action (actions or inaction) and its punish, soften punishment or otherwise improve position, of the person who have committed a crime, shall have back force, and that shall be distributed on the persons who has committed the appropriate action (action or inaction) till the introduction of such law as valid, and also on the persons who is sentenced, or who has served sentenced time but previous conviction is not removed or is not extinguished.

10.4. The criminal law, provided for by criminality of action (actions or inactivity), strengthening punishment or otherwise worsening position of the person who has committed a crime, shall not have back force.

BOSNIA AND HERZEGOVINA

Criminal Code, Article 4

(1) The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.

(2) If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

BULGARIA

Criminal Code, Article 2

Art. 2. (1) Applied for each crime shall be the law which has been in force at the time of its perpetration.

(2) If, until the enactment of the verdict different laws follow applied shall be the law which is most favourable for the perpetrator.

CYPRUS

Constitution, Article 12 § 1

No person shall be held guilty of any offence on account of any act or omission which did not constitute an offence under the law at the time when it was committed; and no person shall have a heavier punishment imposed on him for an offence other than that expressly provided for it by law at the time when it was committed.

CROATIA

Constitution, Article 31

1. No one shall be punished for an act which before its commission was not defined as a punishable offence by law or international law, nor he may be sentenced to a penalty which was not defined by law. If a less severe penalty is determined by law after the commission of an act, such penalty shall be imposed.

CZECH REPUBLIC

Criminal Code, Article 16

§ 16 §§1, 2

(1) The liability to punishment for an act shall be considered according to the Act (law) in force at the time when the act was committed; it shall be considered under a subsequent Act only if consideration under such law is more favorable to the offender.

(2) Only such punishment can be imposed upon an offender as may be imposed under the Act in effect at the time when a verdict on the criminal offence is made.

ESTONIA

Constitution, Article 23 §§ 1 and 2

No one shall be convicted of an act which did not constitute a criminal offence under the law in force at the time the act was committed.

No one shall have a more severe punishment imposed on him or her than the one that was applicable at the time the offence was committed. If, subsequent to the commission of an offence, the law provides for a lesser punishment, the lesser punishment shall apply.

Criminal Code, 14. § 5(2) - Temporal applicability of penal law

An Act which precludes the punishability of an act, mitigates a punishment or otherwise alleviates the situation of a person shall have retroactive effect.

FINLAND

Constitution, Section 8 - The principle of legality in criminal cases

No one shall be found guilty of a criminal offence or be sentenced to a punishment on the basis of a deed, which has not been determined punishable by an Act at the time of its commission. The penalty imposed for an offence shall not be more severe than that provided by an Act at the time of commission of the offence.

FRANCECriminal Code, Article 112-1

Conduct is only punishable where it constituted a criminal offence at the time when it took place.

Only those penalties legally applicable at the same date may be imposed.

However, new provisions are applicable to offences committed before their coming into force and which have not led to a res judicata sentence, when they are less severe than the previous provisions.

GEORGIAConstitution, Article 42 § 5

No one shall be held responsible on account of an action, which did not constitute a criminal offence at the time it was committed. The law that neither mitigates nor abrogates responsibility shall have no retroactive force.

GERMANYCriminal Code, Section 1 No Punishment Without a Law

An act may only be punished if its punishability was determined by law before the act was committed.

Section 2 Temporal Applicability

(1) The punishment and its collateral consequences are determined by the law which is in force at the time of the act.

(2) If the threatened punishment is amended during the commission of the act, then the law shall be applicable which is in force at the time the act is completed.

(3) If the law in force upon the completion of the act is amended before judgment, then the most lenient law shall be applicable.

(4) A law, which was intended to be in force only for a determinate time, shall be applicable to acts committed while it was in force, even if it is no longer in force. This shall not apply to the extent a law provides otherwise.

(5) Subsections (1) through (4) shall apply, correspondingly, to forfeiture, confiscation and rendering unusable.

(6) Unless the law provides otherwise, decisions as to measures of reform and prevention shall be according to the law which is in force at the time of judgment.

GREECECriminal Code, Article 7

1. There shall be no crime, nor shall punishment be inflicted unless specified by law in force prior to the perpetration of the act, defining the constitutive elements of the act. In no case shall punishment more severe than that specified at the time of the perpetration of the act be inflicted.

HUNGARYConstitution, Article 57

(4) No one shall be declared guilty and subjected to punishment for an offense that was not a criminal offence under Hungarian law at the time such offence was committed.

Section 2 Criminal Code

A crime shall be adjudged in accordance with the law in force at the time of its perpetration. If, in accordance with the new Criminal Code in force at the time of the judgment of an act, the act is no longer an act of crime or it is to be adjudged more leniently, then the new law shall apply; otherwise, the new Criminal Code has no retroactive force.

ITALY

Constitution, Art. 25

1. No one may be removed from the natural judge pre-established by law.
2. No one may be punished except on the basis of a law already in force before the offence was committed. (...)

Criminal Code, Article 2

§ 2 No one may be punished for an act which according to a posterior law does not constitute a criminal offence, and if there has been a conviction its enforcement and its effects must cease.

§ 4 If the law in force at the time of the committed crime and the subsequent law are different, the more favourable law is enforced only when the final decision has not yet been delivered.

LATVIA

Criminal Code Section 5. Time when The Criminal Law is In Force

(1) The criminality and punishability of an offence (act or failure to act) are determined by the law, which was in force at the time the offence was committed.

(2) A law which recognises an offence as not punishable, reduces the sentence or otherwise is beneficial to a person, as long as it is not provided otherwise by the applicable law, has retrospective effect, that is, it applies to offences which have been committed prior to the applicable law coming into force, as well as to a person who is serving a sentence or has served a sentence but regarding whom conviction remains in effect.

(3) A law, which recognises an offence as punishable, increases the sentence, or is otherwise not beneficial to a person, does not have retrospective effect.

(4) A person, who has committed an offence against humanity, an offence against peace, a war crime or has participated in genocide, shall be punishable irrespective of the time when such offence was committed.

LITHUANIA

Criminal Code, Article 7 § 2

A law, abolishing criminality of a deed, mitigating punishment or otherwise ameliorating the legal situation of a person who has committed the deed, shall be retroactively valid, i.e. it shall be applicable to the persons who had committed respective deeds before the said law went into effect, as well as to the persons serving the sentence and to those who have previous record.

MOLDOVA

Constitution, Article 22. Non-retroactivity of the law

No one shall be sentenced for actions or drawbacks, which did not constitute an offence at the time they were committed. No punishment more severe than that applicable at the time when the offence was committed shall be imposed.

Criminal Code, Article 10. The retroactive effect of the criminal law

1) The criminal law that eliminates the criminal character of the act, diminishes the punishment or in other way improves the situation of the person who committed the crime, has retroactive character, that means it extends on individuals who committed the respective crimes prior to the enforcement of this law, including individuals who are serving or who have served the punishment (execute?), but have criminal antecedents.

2) A criminal law that aggravates the penalty or the situation of a person guilty for committing a crime, has no retroactive effect.

NORWAYConstitution, Article 97

No law must be given retroactive effect.

Criminal Code, § 3

§ 3. If the criminal legislation has been amended in the period following the commission of an act, the penal provisions in force at the time of its commission shall be applicable to the act unless otherwise provided.

The penal provisions in force at the time a particular issue is decided shall be applicable when they lead to a decision more favourable to the person charged than the provisions in force at the time of commission of the act. However, in the case of an appeal, interlocutory appeal, or a petition for reopening a case, no account shall be taken of provisions that come into force only after the decision occasioning the appeal, interlocutory appeal, or petition for reopening the case, has been made.

If a prosecution or execution of sentence has been lawfully commenced, no account shall be taken of the fact that by a subsequent enactment the right to prosecute or to execute sentence is statute-barred or the prosecution is made dependent on an application by the aggrieved person or is left to him.

The time-limit prescribed by a new Act for an aggrieved person's right to prosecute or to apply for a prosecution shall in no case begin to run until the said Act comes into force.

PORTUGALConstitution, Article 29 § 4.

No one shall be the object of a sentence or security measure that is more severe than those provided for at the moment of the conduct in question, or at that at which the prerequisites for the application of such a measure were fulfilled. However, criminal laws the content of which is more favourable to the defendant shall be applied retroactively.

ROMANIAConstitution, Article 15 § 2

The law shall only act for the future, except for the more favourable criminal or administrative law.

RUSSIAN FEDERATIONConstitution, Article 54 § 2

2. No one may bear responsibility for the action which was not regarded as a crime when it was committed. If after violating law the responsibility for that is eliminated or mitigated, a new law shall be applied.

SAN MARINODeclaration on fundamental rights, Article 15 § 4

Penalties, which shall be humane and rehabilitative in nature, may be imposed solely by a court established by law and only on the basis of legislation without retrospective effect.

Criminal Code, Article 3

No one can be punished for committing an act which at the time of its commission did not amount to a crime or be liable to a harsher penalty than that foreseen by the law which was in force at that time. The new law which abrogates an offence has retroactive effect, and if there has been a conviction, its enforcement and its effects will cease. The new law which is more favourable to the accused has retroactive effect, unless a final judgment was delivered. The judge, even proprio motu, re-examines the penalties imposed with the conviction when the new law imposes a penalty which is lighter by two degrees.

SLOVAK REPUBLIC

Constitution, Article 50 (6)

Whether any act is criminal is assessed, and punishment is determined, in accordance with the law valid at the time when the act was committed. A more recent law is applied, if it is more favorable for the perpetrator.

SLOVENIA

Constitution, Article 28 Principle of Legality in Criminal Law

No one may be punished for an act which had not been declared a criminal offence under law, or for which a penalty had not been prescribed, at the time the act was performed.

Acts that are criminal shall be established and the resulting penalties pronounced according to the law that was in force at the time the act was performed, save where a more recent law adopted is more lenient towards the offender.

SPAIN

Constitution, Article 25

1. No one may be convicted or sentenced for any act or omission which at the time it was committed did not constitute a felony, misdemeanour or administrative offence according to the law in force at that time.

Criminal Code, Article 2

§ 2 Derogations to the laws are established by other laws adopted later. Derogations are determined strictly by the provision of the new law and will be applicable to any incompatible provisions of the previous law on the same matter. By the simple derogation to the law, previously cancelled provisions do not enter into force

SWEDEN

Chapter 2, Article 10 § 1 of the Instrument of government

Art. 10. No penalty or penal sanction may be imposed in respect of an act which was not subject to a penal sanction at the time it was committed. Nor may any penal sanction be imposed which is more severe than that which was in force when the act was committed. The provisions thus laid down with respect to penal sanctions apply in like manner to forfeiture and other special legal effects attaching to a criminal act.

SWITZERLAND

Federal Criminal Code, Article 2

1 Sera jugée d'après le présent code toute personne qui aura commis un crime ou un délit après l'entrée en vigueur de ce code.

2 Le présent code est aussi applicable aux crimes et aux délits commis avant la date de son entrée en vigueur, si l'auteur n'est mis en jugement qu'après cette date et si le présent code lui est plus favorable que la loi en vigueur au moment de l'infraction

TURKEY

Constitution, Article 38

No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed.

Criminal Code, Article 7

(1) A person may neither be punishment nor subject to a security measure for an act which does not constitute an offense according to the law in force at the time of commission of the offense. Also, one may neither be punished nor subject to a security measure for an act which does not constitute an offense according to the law which put into force after the commission of the offense. Where a punishment or security precautions of that sort is imposed, its execution and legal consequences are spontaneously abrogated.

(2) Where there are differences between provisions of the law in force at the time of commission of the offense and the provisions of the law subsequently put into force, the law which is in favor of the perpetrator is applied and enforced.

(3) The law in force at the time of conviction is applied in respect of execution of security precautions.

(4) The provisional or permanent laws are continued to be applied for the offenses which are committed during the period when they are in force.

UNITED KINGDOM

Human Rights Act, Article 7

1 - No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2 - This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

UKRAINE

Constitution, Article 58

Laws and other normative legal acts have no retroactive force, except in cases where they mitigate or annul the responsibility of a person.

No one shall bear responsibility for acts that, at the time they were committed, were not deemed by law to be an offence.

Provisions of constitutions or criminal codes of countries not providing for the principle of retroactivity of the more favourable law

FINLAND

Criminal Code, Section 8 - The principle of legality in criminal cases

No one shall be found guilty of a criminal offence or be sentenced to a punishment on the basis of a deed, which has not been determined punishable by an Act at the time of its commission. The penalty imposed for an offence shall not be more severe than that provided by an Act at the time of commission of the offence.

ICELAND

Constitution, Article 69

No one may be subjected to punishment unless found guilty of conduct that constituted a criminal offence according to the law at the time when it was committed, or is totally analogous to such conduct. The sanctions may not be more severe than the law permitted at the time of commission.

IRELAND

Constitution, Article 15 § 5 1°

The Oireachtas [the National Parliament] shall not declare acts to be infringements of the law which were not so at the date of their commission.

MALTA

Constitution, Article 39, § 8

No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.

MONTENEGRO

Constitution, Article 33

No one may be punished for an act that, prior to being committed, was not stipulated by the law as punishable, nor may be pronounced a punishment which was not envisaged for that act.

POLAND

Constitution, Article 42§1

Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.

Criminal Code, Article 1

Article 1. § 1. Penal liability shall be incurred only by a person who commits an act prohibited under penalty, by a law in force at the time of its commission.

“the former Yugoslav Republic of Macedonia”

Criminal Code, Article 1

Nobody can be sentenced to a punishment or some other penal sanction for an act, which before it was committed, was not determined by law to be a crime and for which no punishment was prescribed by law.