

FEW QUESTIONS YET TO BE ANSWERED IN REGARD TO THE ARTICLE 7 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*

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ABSTRACT

The aim of this paper is not only to analyze the case-law of ECtHR and its development of the principle nullum crimen, nulla poena sine lege, but also to determine and draw attention to some unresolved issues, ambiguities, and inconsistencies regarding the Article 7. Special attention will be paid to the distinction that ECtHR draws between the imposition of a penalty and its enforcement, where the latter is not considered as part of the “punishment” within the meaning of Article 7, leading to the conclusion that the prohibition of retroactivity has no effect on it. The paper will analyze ECtHR’s reasoning related to this matter and test the opposite thesis that the ex post facto prohibition should be applied on the enforcement of the penalty in the same manner as it is applied on its imposition. The influence of the EU Charter of Fundamental Rights on the development of the prohibition of retroactivity will also be emphasized. Furthermore, in the case of Scoppola v. Italy (No. 2), ECtHR has specified that the rules on retroactivity do not apply to procedural laws, which immediate application is in conformity with the tempus regit actum principle. However, as it will be argued, there are some examples that may show how their retroactive application increases the likelihood of the conviction and therefore puts the defendant in a detrimental position, breaching the principle of legal certainty. In the light of that, it will be discussed whether the rules of criminal procedure should be given retroactive effect, particularly when they benefit the accused.

Keywords: *Non-retroactivity of Criminal law, Nullum crimen, nulla poena sine lege, European Convention on Human Rights, European Court of Human Rights, Foreseeability*

* This paper is a contribution to the project 'Identity Transformation of Serbia' supported by the Faculty of Law University of Belgrade

1. SOME GENERAL REMARKS ON ARTICLE 'NO PUNISHMENT WITHOUT LAW'

It could be considered common legal knowledge that the prohibition of retroactive application of criminal law is a derivative of a *nullum crimen, nulla poena sine lege* principle, a general principle of criminal law which prohibits criminalizing acts committed prior to the entry into force of a rule banning such conduct as a crime. The evolution of this principle was furthered by the development of international law and eventually it became an internationally recognized human right – the right not to be prosecuted or punished without legal basis, guaranteed by many universal and regional human rights instruments.¹

Article 7 of the European Convention of Human Rights (hereinafter: ECHR) is titled 'No punishment without law' and while embodying the principle of legality, it stipulates that 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 That is to say, it stands for the legal definitiveness of an offence, but also constitutes a ban on an overly broad construction of criminal provisions, in particular by analogy.³ The underlying idea of the rule is that justice requires someone to be held only criminally responsible on the basis of law which was in force at the time of the commission. Furthermore, law should be sufficiently precise (*lex certa*), must be strictly construed - implying the ban on analogous application (*lex stricta*) and should not be applied retroactively - prohibition of *ex post facto* law (*lex praevia*).⁴ Article 7 seeks to provide certainty by requiring governance in accordance with prior rules. Primarily, it should serve as a limitation on the power of the legislature, which is under obligation to enact laws prospectively.⁵ In addition, the rule imposes restrictions on the courts, since they should only apply the law which was already enacted and entered into force at the time the offence was committed, not the law in effect when the offender is indicted, pending trial

¹ Article 15 of the International Covenant on Civil and Political Rights, *UN Treaty Series*, vol. 999, p. 171; Article 9 of the American Convention on Human Rights, *Organisation of American States (OAS)*; Article 7 of the African Charter on Human and Peoples' Rights, *Organisation of African Unity (OAU)*; Article 49 of the Charter of Fundamental Rights of the European Union, 2012/C 326/02

² Article 7 of the European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

³ *Kokkinakis v. Greece* (1993) 17 EHRR 397, para. 52

⁴ van der Wilt, H., *Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test*, *Nordic Journal of International Law*, vol. 84, 2015, p. 516

⁵ Mokhtar, A., *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, *Statute Law Review*, vol. 26, no. 1, 2005, p. 48

or on trial.⁶ Similarly, the rule applies to the laws that aggravate the penalties of an offence.⁷

Most importantly, Article 7 represents *conditio sine qua non* of a democratic society. According to Article 15 (2) of the ECHR no derogation from it is allowed in time of war or public emergency.⁸ European Court of Human Rights (hereinafter: ECtHR) explained that ‘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 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’.⁹ Therefore, by reason of being non-derogable and absolute right, hence part of the *noyau dur* of human rights,¹⁰ Article 7 should not be subject to any limitation, except for something that seems to be the sole explicit exception provided in the text of the Convention itself.

Namely, the second paragraph of Article 7 reads that 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 recognized by civilized nations.¹¹ Arguably, it mirrors the weak status of the legality principle immediately after the end of WWII, when it has not yet been recognized as an international human right.¹² In fact, the time of Nuremberg trials was more than somewhat marked by the retroactive application of criminal law with regard to acts considered immoral by the community of nations.¹³ Even the Nuremberg Tribunal itself readily submitted that it inevitably had to apply

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Article 15 (2) of ECHR; Virjan, B., *Principle of Non-Retroactivity of Criminal Law According to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Law Annals of Titu Maiorescu University, 2012, p. 96

⁹ *S.W. v. United Kingdom* (1995) 21 EHRR 363, para. 35

¹⁰ Shabas, W., *Perverse Effects of the Nulla Poena Principle: National Practice and the Ad Hoc Tribunals*, European Journal of International Law, vol. 11, no. 3, 2000, p. 522

¹¹ For more about the question whether the principle *nullum crimen sine lege* always prohibits an international criminal court from regarding an act as a crime where, at the time it was done, it did not correspond in its totality with the legal provision proscribing it, see Shahabudeen, M., *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, Journal of International Criminal Justice, vol. 2, no. 4, 2004, pp. 1007-1017

¹² Rychlewska, A., *The Nullum Crimen Sine Lege Principle in the European Convention of Human Rights: The Actual Scope of Guarantees*, Polish Yearbook of International Law, vol. 36, 2016, p. 164

¹³ Cassese, A., *International Criminal Law*, Oxford University Press, 2003, p. 72

the law retroactively, when observed that: ‘The maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. The Nazi leaders must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression’¹⁴. Hence, with an eye to avoid affording Nazi criminals a claim of a violation of the *nullum crimen sine lege* principle before ECtHR, the so-called ‘Nuremberg clause’ was inserted in Article 7.¹⁵ When it comes to the legal nature of the clause, one should be careful when qualifying it as a derogation from the principle of non-retroactivity of criminal law.¹⁶ Although ECtHR described it as ‘an exceptional derogation from the general principle laid down in the first paragraph’, it went further to recall the *travaux préparatoires* which show that the purpose of the second paragraph is to specify that Article 7 does not affect laws that, in the wholly exceptional circumstances at the end of WWII, were passed in order to punish war crimes, treason, collaboration with the enemy, etc.¹⁷ Considering that Article 7 is a non-derogable right, it must be concluded that the second paragraph is completely unrelated to the derogation, but rather represents ‘a contextual clarification of the liability limb of the general rule of non-retroactivity laid down in the first paragraph, which was included to ensure that there was no doubt about the validity of prosecutions after the WWII in respect to the crimes committed during the war’¹⁸. It is thus clear that the drafters of the Convention did not intend to allow for any general exception to the rule of non-retroactivity.¹⁹ In other words, the second paragraph of Article 7 should be considered as an interpretation clause, with the aim of clarifying that the Convention system of protection allows domestic authorities to punish retrospectively individuals who have committed acts which, although not criminalised by any law at the time of commission, were unacceptable under the general principles of law recognized by civilized nations.²⁰

¹⁴ *France et al. v. Goering et al.* (1946) 22 IMT pp. 411, 466

¹⁵ Mariniello, T., *The ‘Nuremberg Clause’ and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence*, *Nordic Journal of International Law*, vol. 82, 2013, p. 226

¹⁶ For such a qualification see Virjan, *op. cit.*, note 8, p. 102

¹⁷ *Kononov v. Latvia* (2010) ECHR 667, para. 115

¹⁸ *Vasiliauskas v. Lithuania* (2015) ECHR 332, para. 189

¹⁹ *Ibid.*

²⁰ See also Francioni, F., *Crimini internazionali*, *Digesto delle Discipline Pubblicistiche*, Vol. IV, 1989

Moreover, ECtHR has held in a number of cases that the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner.²¹ Should that be the case, it remains unclear why general principles of law recognized by civilized nations do not fall within the meaning of the general term ‘international law’ from the first paragraph of Article 7. As a matter of fact, pursuant to Article 38(1)(c) of the Statute of the International Court of Justice the general principles of law recognized by civilized nations are a (subsidiary) source of international law.²² They refer to norms common to national legal systems of majority of states or at least states involved in a dispute.²³ Thus, they are originally source of national laws and only give rise to the international law once the International Court of Justice (or any other international court or tribunal) recognize and apply them in a particular case.²⁴ It is not apparent why other sources of international law, *i.e.* customary or treaty law were considered less relevant in criminalizing acts or omissions than general principles of law recognized by civilized nations. This ambiguity together with the fact that the second paragraph is not limited to war crimes have led some authors to indicate that it may potentially allow state authorities to prosecute an individual for a wide range of acts prohibited in other states.²⁵ Obviously, it would have been far more appropriate if the drafters were consistent with the use of a broad term ‘international law’ rather than segregating one particular source in the second paragraph of Article 7. Regardless, this incongruity could be overcome by ECtHR if it continues to interpret paragraph 2 of Article 7 as referring to international crimes, irrespective of their source.²⁶

Some authors have accurately described Article 7 as a poorer relative of the matured Article 6 of the ECHR.²⁷ There is really no denying that it represents an under-theorized as well as under-developed aspect of the ECHR, probably due to multiple of causes. One of them may be confounding case-law regarding this Article, that is to say different approaches to the same issues concerning imple-

²¹ *Vasiliauskas v. Lithuania*, *op. cit.*, note 16, para. 189

²² Statute of the International Court of Justice, *United Nations*, 18 April 1946

²³ Kreča, M., *Međunarodno javno pravo*, Pravni fakultet Univerziteta u Beogradu, 2014, p. 95

²⁴ *Ibid.*

²⁵ Murphy, C. C., *The Principle of Legality in Criminal Law under the ECtHR*, *European Human Rights Law Review*, vol. 2, 2010, p. 207

²⁶ Rauter has taken the view that ECtHR indicated such a distinction between the applicability of the *nullum crimen sine lege* principle in relation to ‘ordinary’ domestic crimes and ‘international crimes’, where the latter are covered by paragraph 2 of Article 7 in the case of *Naletilić v. Croatia*, Rauter, T., *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, Springer, 2017, p. 36

²⁷ Murphy, *op. cit.*, note 25, pp. 192-193. See also Greer, S., *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge University Press, 2006

mentation, which may have led to misunderstandings and discouragement of individuals to claim breaches of this particular right before ECtHR.²⁸

Therefore, the aim of this paper is to shed light on some of the unresolved issues, ambiguities and inconsistencies detected in the case-law of ECtHR, hence to contribute that not only every individual understands what Article 7 guarantees them and how it protects them, but also to open eyes of ECtHR to some deficiencies in its case-law along with aspects to which the scope of Article 7 may be expanded.

2. HOW FAR-SIGHTED ONE SHOULD BE IN ORDER TO FORESEE THE CHANGES IN CRIMINAL LAW?

As previously mentioned, while Article 7 particularly prohibits extending the scope of existing offences to acts which were previously not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy.²⁹ It follows that offences and the relevant penalties must be clearly defined by law.³⁰ This requirement is satisfied where the individual can 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.³¹ ECtHR also explained that 'when speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises both statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability'.³²

Hence, the first finding to be clarified is regarding the term 'law', which has an autonomous meaning and includes judge-made law along with legislation, whether primary or delegated.³³ In *SW & CR v UK*, cases concerning two men who were prosecuted for forcing their wives to have sexual intercourse with them, the status of the common law as 'law' was upheld.³⁴ While the common law had previously considered husbands immune from charges of rape against their wives, this posi-

²⁸ Murphy had a point when noticed that (only, *A. Z.*) in an ideal world, a low violation count would be evidence of high compliance. However, in the context of (ever, *A.Z.*) increasing pleas to ECtHR, the under-use of Article 7 is unusual, Murphy, *op. cit.*, note 25, p. 193

²⁹ *Coëme and Others v. Belgium* (2000) ECHR 2000-VII, para. 145

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ Harris, D.J., *et al.*, *Law of the European Convention on Human Rights*, Oxford University Press, 2018, pp. 492-493

³⁴ *S.W. v. United Kingdom*, note 9, para. 39; *C.R. v. United Kingdom* (1995) 21 EHRR 363, paras. 47-50

tion was eventually changed by the House of Lords and the two applicants were prosecuted and convicted.³⁵ ECtHR noted that ‘in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen’.³⁶ What is more, it emphasized that ‘the essentially debasing character of rape is so manifest so the result of the decisions ... that the applicant could be convicted ... irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7’, and that ‘the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilized concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom’.³⁷

It must be underlined that in these cases relevant acts, which the applicants had been convicted of, constituted an outstanding example of the crime *mala in se*, where a common sense of justice implies punishability, thence the foreseeability test of criminal responsibility would be more easily satisfied.³⁸ Moreover, the Court reiterated that the conclusion of the national authorities that ‘a rapist remains a rapist subject to the criminal law, irrespective of his relationship with the victim’ was in accordance with a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife.³⁹ Notwithstanding, some authors are doubtful whether a ‘perceptible line of case-law devel-

³⁵ *Ibid.*

³⁶ *Ibid.*, *S.W. v. United Kingdom*, note 9, para. 36

³⁷ *Ibid.*, para. 44

³⁸ Similar observation is made by Rychlewska, however she concluded that ‘a common sense of justice requires a perpetrator to be punished regardless of the principle of *nullum crimen sine lege* and, in these special cases, regardless of the degree of foreseeability of criminal responsibility’, Rychlewska, *op. cit.*, note 12, p. 182

³⁹ *S.W. v. United Kingdom*, note 9, paras. 11, 23-27, 43. Greer found that one of the peculiarities of these cases is that the central issue was not settled by ‘balancing’ the wife’s implicit right not to have sex with her husband against her consent (as implicitly guaranteed by Articles 3 and 8) with the husband’s putative right not to be punished without law provided by Article 7, nor was the right provided by Article 7 ‘balanced’ against the public interest represented by the modern conception of marriage. Instead the Court itself defined the scope of each right by identifying, through reference to contemporary standards, the underlying interests and values most at stake, Greer, *op. cit.*, note 27, p. 240. However, this way of Court’s reasoning seems to be in accordance with the absolute nature of Article 7, which excludes every application of the proportionality test, *i.e.* balancing with other rights or interests

opment' is a sufficient source of foreseeability.⁴⁰ That could be particularly true in reference to *mala prohibita*, since in those circumstances an individual must be pretty well-informed about which commissions or omissions are prohibited.⁴¹ European Commission of Human Rights also elucidated that existing offences should not be extended so as to cover facts which previously did not entail criminal responsibility. Specifically, 'this implies that constituent elements of an offence such as the particular form of culpability required for its completion may not be essentially changed, at least not to the detriment of the accused, by the case-law of the courts'.⁴²

All things considered, 'law' is a concept comprising both statute law and case-law.⁴³ Put differently, as long as ECtHR is concerned, *lex scripta* does not represent a part of the principle of the legality, as usually understood in civil law traditions. Be that as it may, what seems most importantly is that when criminal law changes via case-law and judicial activism, new standards cannot be abruptly implemented, but gradually developed for a longer period of time, while making sure that the majority of citizens are familiar with new rules and amendments. Finally, ECtHR has always understood the term 'law' in its substantive and not formal sense, meaning that it includes both enactments of lower rank than statutes as well as unwritten law.⁴⁴ In sum, the 'law' is the provision in force as the competent court have interpreted it.⁴⁵

In cases dealing with the *nullum crimen* principle, ECtHR has continually applied the test of accessibility and foreseeability when determining whether the conduct in question falls within the scope of a criminal statute. The stated twin qualitative requirements have consistently featured in its jurisprudence, even outside the context of Article 7,⁴⁶ where the former supposes that the law is publicly available,⁴⁷ while the latter requires that an individual must be able – if need be, with the assistance of the courts' interpretation of relevant provision and appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances,

⁴⁰ Rychlewska, *op. cit.*, note 12, p. 182; Ashworth, A., *Principles of Criminal Law*, Oxford University Press, 2003, pp. 72-73

⁴¹ One of the examples could be hitchhiking, which is illegal at certain locations (for instance on motorways in Italy) or even in some countries

⁴² *X Ltd. and Y v. United Kingdom* (1982) 28 DR 77, para. 9

⁴³ *Sunday Times v. United Kingdom* (1979) 2 EHRR 245, para. 47; *Kruslin v. France* (1990) 12 EHRR 547, para. 29

⁴⁴ *De Wilde, Ooms and Versyp v. Belgium* (1971) 1 EHRR 435, para. 93

⁴⁵ *Leyla Sahin v. Turkey* (2005) 44 EHRR 5, para. 88

⁴⁶ For instance, in regard to Article 5(1) see *Amuur v. France* (1996) 22 EHRR 533, para. 50

⁴⁷ *Kasymakhunov and Saybatalov v. Russia* (2013) ECHR 217, paras. 79, 91, 98

the consequences which a given action may entail, *i. e.* whether it will make him/her criminally liable⁴⁸. One could also read that accessibility implies law to be sufficiently clear for individuals to conduct themselves in accordance with its commands, whereas in regard to judicial development of the law, foreseeability means that any changes must be predictable.⁴⁹ These qualitative requirements must be satisfied with respect to both the definition of an offence and the penalty being carried by the offence in question.⁵⁰ Clearly, the bottom line is that human beings can only adapt their behaviour in order to prevent criminal responsibility, if they are aware of the consequences. The paramount importance of the foreseeability is apparent from the description of Article 7 as an internationally recognized human right to foreseeable criminalization.⁵¹ However, foreseeability becomes especially puzzling in the perspective of international crimes. It is imaginable that a concrete behaviour is not forbidden under national law, but punishable according to the international rules. It follows that a perpetrator may be prosecuted by a foreign or international court, or even national court after a regime or legislation change, although at the time of the commission not aware that the act was proscribed by international law.⁵² Of course, whether that particular act qualifies as a crime is completely up to an international or national court to decide. As application of the law inevitably involves an element of judicial interpretation, different courts may come to different conclusions. That is probably the very reason why ECtHR refrains from deciding on an individual applicant's criminal responsibility.⁵³

So, the foreseeability test requires that an accused has a general sense of the laws and customs in order to recognize when his behaviour may possibly constitute a violation of those standards, amounting to even international crimes. The starting point in analysing the foreseeability is an objective assessment, akin to the reason-

⁴⁸ *Korbely v. Hungary* (2008) ECHR 847, para. 70; *Del Rio Prada v. Spain* (2013) 58 EHRR 37, para. 125

⁴⁹ *Murphy, op. cit.*, note 25, pp. 201

⁵⁰ *Achour v. France* (2006) 45 EHRR 2, para. 41

⁵¹ Rychlewska, *op. cit.*, note 12, p. 168; Peristeridou, C., *The Principle of Legality in European Criminal Law*, Intersentia, 2015

⁵² Cassese, A., *Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law*, *Journal of International Criminal Justice*, vol. 4, 2006, p. 417. This led some authors to criticize ECtHR for occasionally refraining from applying the accessibility and foreseeability test in the regard to international crimes, van der Wilt, H., *op. cit.*, note 4, p. 526. One of the fundamental judgments concerning the general question as to how new regimes should deal with grave human rights violations which occurred under the former regime is *Vasiliauskas v. Lithuania*, *op. cit.*, note 16. See also *Streletz, Kessler and Krenz v. Germany* (2001) ECHR 2001-II, the case about high ranking officials and law-makers of the German Democratic Republic that were convicted of incitement to murder many young people trying to escape to the West, which was in accordance with the legal practice of that time and that particular regime.

⁵³ van der Wilt, H., *op. cit.*, note 4, p. 527

able person standard, but ECtHR held that the personal circumstances and abilities are relevant, too.⁵⁴ There is no denying that the assessment of foreseeability is by no means an easy affair, which is probably why ECtHR took a flexible case-by-case approach and sometimes even failed to apply them in an uniform manner.

3. KAFKAESQUE DISTINCTION BETWEEN THE ‘PENALTY’ AND THE ‘ENFORCEMENT OF THE PENALTY’ – IS IT REALLY NECESSARY?

The third and final prohibition in Article 7(1) prevents a harsher penalty from being imposed than that prescribed by law at the time the offence was committed. For example, in the *Welch* case, the Court found that the imposition of a confiscation order on conviction for drug offences was a retrospective heavier penalty as the legislation governing the orders was introduced after the offence was committed.⁵⁵ The Government did not dispute the retrospectivity of the order, but claimed that it was not a criminal penalty as it was concerned with the prevention of future drugs trafficking.⁵⁶ ECtHR elucidated that ‘the concept of a penalty (in Article 7) is, like the notion of ‘civil rights and obligations’ and ‘criminal charge’ in Article 6 (1), an autonomous Convention concept. To render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a penalty’.⁵⁷ The starting-point in any assessment is whether the measure follows conviction for a ‘criminal offence’, while other factors to be taken into account are ‘the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity’.⁵⁸ This combination of punitive elements led to the conclusion that the confiscation order was a criminal penalty and since it was applied retrospectively, there was a breach of Article 7.⁵⁹

The imposition of a penalty by analogy can also violate the principle embodied in Article 7, as in *Başkaya and Okçuoğlu v. Turkey*, the case concerning a sentence to a term of imprisonment imposed on a publisher, under a provision applicable to editors.⁶⁰ On the other hand, it is not the role of ECtHR to decide on the appro-

⁵⁴ *Soros v. France* (2011) ECHR 172, para. 53

⁵⁵ *Welch v. United Kingdom* (1995) 20 EHRR 247, para. 35

⁵⁶ *Ibid.*, paras. 22-25

⁵⁷ *Ibid.*, para. 27

⁵⁸ *Ibid.*, para. 28

⁵⁹ *Ibid.*, para. 35

⁶⁰ *Başkaya and Okçuoğlu v. Turkey* (1999) ECHR 42, paras. 42-43

priate length of the prison sentence or the type of penalty in general which should be served for particular crime.⁶¹

In the year of 1986, the European Commission of Human Rights developed what could be considered the first Strasbourg doctrine concerning retrospective punishment - a distinction between a 'penalty' and the 'enforcement of a penalty'.⁶² The case affected a killer sentenced to life imprisonment. After 13 years in closed prison, the applicant was transferred to an open prison, which was usually considered as a step towards release. However, after one year, the applicant was suddenly returned to a closed prison, and, on that same day, the competent secretary of state announced a new and harsher parole policy towards offenders of serious crimes, according to which, all offenders should expect to serve a minimum of 20 years in prison. His appeal for an early release had been rejected, so he introduced an application before the Commission stating that, *inter alia*, the new governmental policy had had the effect of imposing a harsher penalty than originally imposed by the judge at the time of the crime and at the time of his sentencing. When it comes to the impacts of the new policy, the Commission took the stance that even if it had had the effect of increasing the length of the imprisonment, this question related to the enforcement of the sentence as opposed to the imposition of a penalty.⁶³ The penalty was that of life imprisonment and that had never been changed, so it could not be said that the penalty imposed was heavier than what had been imposed by the domestic court.⁶⁴ There was no detailed explanation, nor presentation of any guidelines for distinguishing the penalty from its enforcement. The decision ignored the fact that, by spoiling the legitimate expectations that the applicant could have nourished in view of the legal framework at the time the crime took place, a new and tougher sentence had somehow been added to the original one.⁶⁵

3.1. *Kafkaris v. Cyprus*

On the face of it, similar to *Hogben* is the *Kafkaris* case.⁶⁶ *Kafkaris* was convicted for premeditated murder committed in 1987 and sentenced to life imprisonment.⁶⁷

⁶¹ *Vinter and Others v. United Kingdom* (2013) ECHR 645, para. 105. Issues relating to the 'gross disproportionality' of a penalty are to be assessed under Article 3 of the Convention, para. 102

⁶² *Hogben v. United Kingdom* (1986) 46 DR 231

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Sanz-Caballero, S., *The Principle of Nulla Poena Sine Lege Revisited: The Retrospective Application of Criminal Law in the Eyes of the European Court of Human Rights*, *European Journal of International Law*, vol. 28, no. 3, 2017, p. 792

⁶⁶ *Kafkaris v. Cyprus* (2008) 49 EHRR 877

⁶⁷ *Ibid.*, para. 12

During the hearing, the prosecution invited the court to examine the meaning of the term ‘life imprisonment’ in the Criminal Code and to clarify whether it entailed imprisonment of the convicted person to the rest of his life or just for a period of 20 years, as provided by the Prison Regulations in force at the time.⁶⁸ Besides, pursuant to the Prison Regulations, life prisoners were eligible for remission of up to a quarter of their sentence.⁶⁹ The court held that the term meant imprisonment for the remainder of the life of the convicted person.⁷⁰ Regardless, after incarceration the applicant was given a written notice specifying the duration of his sentence to 20 years and stating that an early release depended on his good conduct and industry during detention, hence setting the date for his release in 2002.⁷¹ However, in litigation not involving the applicant, the Prison Regulations were declared unconstitutional.⁷² As the new regulation prevented prisoners from applying for remission, the applicant was not released at the previously promised date.⁷³ He argued before the ECtHR that the unforeseeable prolongation of his term of imprisonment together with the retroactive application of the new legislation violated Article 7.⁷⁴

ECtHR accepted the Government’s argument that the purpose of the Regulations concerned the execution of the penalty, but admitted that in reality the distinction between the scope of a life sentence and the manner of its execution was not immediately apparent.⁷⁵ At the same time, it did not accept the applicant’s argument that a heavier penalty was retroactively imposed on him since in view of the substantive provisions of the Criminal Code it could not be said that at the material time the penalty of a life sentence could clearly be taken to have amounted to twenty years’ imprisonment.⁷⁶ Therefore, ECtHR considered that there was no element of retrospective imposition of a heavier penalty involved in the present case, but rather a question of ‘quality of law’.⁷⁷ In particular, it found that at the time the applicant committed the offence, the relevant Cypriot law taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances,

⁶⁸ *Ibid.*, para. 13

⁶⁹ *Ibid.*, para. 16

⁷⁰ *Ibid.*, para. 14

⁷¹ *Ibid.*, para. 16

⁷² *Ibid.*, para. 19

⁷³ *Ibid.*, para. 23

⁷⁴ *Ibid.*, para. 125

⁷⁵ *Ibid.*, para. 148

⁷⁶ *Ibid.*, para. 149

⁷⁷ *Ibid.*, para. 150

the scope of the penalty of life imprisonment and the manner of its execution.⁷⁸ Based on that fact, a violation of Article 7 was founded.⁷⁹

It must be admitted that this reasoning is quite contradictory. ECtHR found a violation of the principle *nulla poena sine lege*, which prohibits the retrospective effect of criminal legislation, but, at the same time, stated that no heavier penalty was retrospectively imposed. As some authors described it, the Grand Chamber gave a Solomonic solution by saying ‘yes, but no’.⁸⁰ As if this was not enough, the ECtHR introduced the criterion of the ‘quality of law’ for the first time in the context of Article 7. Since it did not bother to explain the meaning of this concept, we can accept the view that it is nothing more than a muddled mix of the existing requirements of accessibility and foreseeability.⁸¹ And when it comes down to it, the whole point really seems to be that the applicant had been led to believe, by a form specifying release date, that he would serve a twenty-year term and that it would be reduced for one quarter had he well behaved. So, taking into account that statutory law together with the courts’ stands and case-law concerning ‘life imprisonment’ was completely different to the actual implementation of that sentence, where the prison authorities continually applied the Prison Regulations, *i. e.* the imprisonment of 20 years with the possibility of remission, it can be argued that the applicant could not foresee the duration of his sentence. What is more, according to judge Borrego ‘no judicial precedent existed in Cyprus in 1987 (the time of the commission) for interpreting life imprisonment as entailing the deprivation of liberty for the remainder of the convicted person’s life’.⁸² But for some reason, ECtHR did not say that. Instead, it noted that the fact that applicant, as a life prisoner, no longer had a right to have his sentence remitted is a matter of the execution of the sentence, not the penalty imposed on him, which remained that of life imprisonment.⁸³ It acknowledged that the changes in the prison legislation and in the conditions of release may have rendered the applicant’s imprisonment effectively harsher, but made it clear that these changes cannot be construed as imposing a heavier penalty than the one imposed by the trial court.⁸⁴ After all, the issues relating to release policies, the manner of their implementation and the reasoning behind them fall within the power of the Member States in determin-

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Sanz-Caballero, *op. cit.*, note 65, p. 794-795

⁸¹ Murphy, *op. cit.*, note 25, p. 207

⁸² *Kafkaris v. Cyprus*, Partly Dissenting Opinion of Judge Borrego, para. 5

⁸³ *Kafkaris v. Cyprus*, *op. cit.*, note 66, para. 151

⁸⁴ *Ibid.*

ing their own criminal policy.⁸⁵ However, it is quite interesting that ‘for more than thirty years the Committee of Ministers and the Parliamentary Assembly have repeatedly concerned themselves with matters relating to long-term sentences and have expressly called on Member States to introduce conditional release in their legislation for those with longer sentences’.⁸⁶ Moreover, in 2007 the Council of Europe’s Commissioner for Human Rights firmly asserted that ‘the use of life sentences should be questioned’.⁸⁷ The same trend could have been observed at the European Union level in regard to the Framework Decision on the European arrest warrant and the surrender procedures between Member States.⁸⁸ Furthermore, long ago has the European Commission of Human Rights expressed the view that a life sentence without a possibility of release might raise issues of inhuman treatment.⁸⁹ So, suddenly it becomes apparent that the question of execution of the penalty is far from being an exclusive matter of national criminal policy, quite the contrary. It rather seems that ECtHR tried to remain within the frame of its own standing, namely that it is not its role to decide what is the appropriate term of detention applicable to a particular offence or to pronounce on the appropriate length of detention or other sentence which should be served⁹⁰. But in doing so, it compromised one of its other rules, in particular that ‘the Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective’⁹¹. It is indeed unfortunate that ECtHR did not realize that Kafkaris’s human right guaranteed by Article 7 remained dead letter. Although the violation was found, ECtHR offered no real remedy to the applicant, which can be understood as directly undermining the absolute nature of the right in question.⁹² It seems that Judge Borrego really made a point when wrote that ‘the reasoning of the judgment is far removed from reality, as though it had been pronounced from an ivory tower’.⁹³

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, Joint Partly Dissenting Opinion of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spelmann and Jebens, para. 4

⁸⁷ *Ibid.*

⁸⁸ It states that ‘if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after twenty years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure ...’, *ibid.*

⁸⁹ *Weeks v. United Kingdom*, 9787/82, Commission Report, 7 December 1984, para. 72

⁹⁰ *T. and V. v. United Kingdom* (1999) 30 EHRR 121, para. 118

⁹¹ *Airey v. Ireland* (1979) 2 EHRR 305, para. 24

⁹² Murphy, *op. cit.*, note 25, p. 207.

⁹³ *Kafkaris v. Cyprus*, Partly Dissenting Opinion of Judge Borrego, para. 1

3.2. *Del Rio Prada v. Spain*

At last, we come to the famous case of *Del Rio Prada v. Spain*.⁹⁴ The applicant had been convicted of terrorism offences and sentenced to a total of over 3,000 years of imprisonment.⁹⁵ Pursuant to the criminal provisions in force at the time when the offences were committed, the national court (*Audiencia Nacional*) fixed the maximum term to be served by the applicant in respect of all her prison sentences combined at thirty years.⁹⁶ The same court set the date on which the applicant would have fully discharged her sentence at 27 June 2017.⁹⁷ In 2008 the prison authorities proposed to the court that the applicant was released on 2 July 2008, because she was entitled to remission due to the work she has done, such as cleaning the prison, her cell and communal areas and undertaking university studies.⁹⁸ However, that proposal was rejected on the basis of the new precedent known as the ‘Parot doctrine’ set by the Supreme Court in 2006.⁹⁹ Conforming to that approach, sentence adjustments and remissions were no longer to be applied to the maximum term of imprisonment of thirty years, but successively to each of the sentences imposed.¹⁰⁰ The national court explained that it should be applied to people convicted under Criminal Code of 1973, which was the applicant’s case, so the date of her release was to be changed accordingly.¹⁰¹ The applicant alleged that the retroactive application of a new doctrine had extended her detention by almost nine years, in violation of Article 7.¹⁰²

The Grand Chamber started its analysis by reminding that both Commission and ECtHR have drawn a distinction between a measure that constitutes in substance a ‘penalty’ and a measure that concerns the ‘execution’ or ‘enforcement’ of the penalty, meaning that where the nature and purpose of a measure relate to the remission of a sentence or a change in a regime for early release, this does not form a part of the ‘penalty’ within the meaning of Article 7.¹⁰³ It also admitted that in practice the distinction between a measure that is ‘penalty’ and a measure that is ‘execution’ or ‘enforcement’ of the penalty may not always be clear cut.¹⁰⁴ What is

⁹⁴ *Del Rio Prada v. Spain*, *op. cit.*, note 48

⁹⁵ *Ibid.*, para. 12

⁹⁶ *Ibid.*, para. 14

⁹⁷ *Ibid.*, para. 15

⁹⁸ *Ibid.*, para. 16

⁹⁹ *Ibid.*, para. 17

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, para. 18

¹⁰² *Ibid.*, para. 56

¹⁰³ *Ibid.*, para. 83

¹⁰⁴ *Ibid.*, para. 85

quite interesting is that Grand Chamber invoked *Kafkaris* case, unriddling it in a way that ‘the manner in which the Prison Regulations concerning the execution of sentences had been understood and applied in respect of the life sentence the applicant was serving went beyond the mere execution of the sentence’.¹⁰⁵ Unfortunately, that was never mentioned in the original *Kafkaris* judgment, but on the contrary that ‘the change in the prison law relates to the execution of the sentence as opposed to the ‘penalty’ imposed on the applicant, which remains that of life imprisonment ... accordingly, there has not been a violation of Article 7 in this regard’.¹⁰⁶

Back to case at hand, the Grand Chamber considered that it was clearly the practice of the Spanish prison and judicial authorities to treat the term of imprisonment to be served, that is to say thirty years, as a new, independent sentence to which certain adjustments, such as remissions of sentence for work done in detention, should be applied.¹⁰⁷ It also noted that such remissions of sentence gave rise to substantial reductions of the term to be served – up to a third of the total sentence – unlike release on licence, which simply provided for improved or more lenient conditions of execution of the sentence, as for example in *Hogben* case.¹⁰⁸ Also, different from other measures that affected the execution of the sentence, the right to remissions for work done in detention was not subject to the discretion of the judge responsible for the execution of the sentences, whose task was simply to apply the law on the basis of proposals made by prison authorities, without considering such criteria as how dangerous the prisoner was considered to be or his prospects of reintegration.¹⁰⁹ However, it admitted that the Criminal Code provided for the exceptions of automatic reduction of the term of imprisonment for work done in detention, namely when the prisoner escaped or attempted to escape or when the prisoner misbehaved.¹¹⁰ But, since in those cases remissions already allowed by the judge represented acquired rights that could not be taken away retroactively, that was enough for the Grand Chamber to distinguish it from *Kafkaris*, where the five years’ remission of sentence granted to life prisoners was conditional on their good conduct.¹¹¹ Although far from apparent, this difference

¹⁰⁵ *Ibid.*

¹⁰⁶ *Kafkaris v. Cyprus, op. cit.*, note 66, para. 151.

¹⁰⁷ *Del Rio Prada v. Spain, op. cit.*, note 48, para. 99

¹⁰⁸ *Ibid.*, para. 101

¹⁰⁹ *Ibid.*, para. 101

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

was enough for the Grand Chamber to conclude that the issue of remission in this particular case falls within the scope of Article 7.¹¹²

Further, the Grand Chamber considered that, at the time when the applicant was convicted and when she was notified of the decision to combine her sentences and to set a maximum term of imprisonment, there was no indication of any line of case-law development in keeping with the Supreme Court's judgment of 2006.¹¹³ Therefore, she could not have foreseen the change in the Supreme Court's case-law which will have the effect of modifying the scope of the penalty imposed to her detriment.¹¹⁴ ECtHR concluded that there had been a violation of Article 7.¹¹⁵

What is clear from the ECtHR reasoning is that both the objective change of the norm that was applied in its original form for decades and the inability of the applicant to anticipate an unexpected judicial ruling led to the violation of Article 7. However, in the instant case the distinction between 'the scope of the penalty' and 'the manner of its execution', which was previously drawn in the *Kafkaris* judgment, became completely blurred.¹¹⁶ Apparently, ECtHR was of the opinion that the new approach concerning remissions of sentences had to be regarded as provision affecting the actual fixing of the sentence and not just its execution. On the other hand, one could wonder whether her position was really different from Kafkaris's. They were both well aware of the sentences they were convicted to. They were both hoping for the remission as a commonly known part of the criminal sentence. And neither of them could have foreseen the changes in the law that made their sentences considerably harsher. What was different though was that in *Kafkaris*, ECtHR held unanimously that the finding of a violation constituted in itself sufficient just satisfaction for the victim and never suggested the release of the applicant.¹¹⁷ On the other hand, in *del Rio Prada*, the Grand Chamber considered it incumbent on the respondent state to ensure that the applicant was released at the earliest possible date.¹¹⁸ The fact is that two applicants in very similar situations did not receive the same treatment from ECtHR.¹¹⁹

To conclude, in both *Kafkaris* and *del Rio Prada*, ECtHR seems to have had many troubles in coping with its own doctrine on the differentiation between a measure

¹¹² *Ibid.*, para. 110

¹¹³ *Ibid.*, para. 117

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, para. 118

¹¹⁶ *Ibid.*, Joint Partly Dissenting Opinion of Judges Mahoney and Vehabović, p. 61

¹¹⁷ *Kafkaris v. Cyprus*, *op. cit.*, note 66, para. 170

¹¹⁸ *Del Rio Prada v. Spain*, *op. cit.*, note 48, para. 139

¹¹⁹ Sanz-Caballero, *op. cit.*, note 65, p. 816

that constitutes in substance a ‘penalty’, for which an absolute ban on retrospective application exists, and a measure that concerns the ‘execution of the penalty’ which remains outside of the scope of Article 7. What the two cases have in common is that the state authorities were wrong to apply national precedents, even if they amounted only to the remission of sentences, retrospectively to crimes committed prior to the change of jurisprudence. It follows that retroactive application of any change in the remission or parole system, whether accomplished by a statutory law, executive practice, or judicial case-law, must contravene the spirit of Article 7, which requires that the guiding principle should always be the ability of individuals to plan their affairs in accordance with the law¹²⁰, even if that is concerning good behaviour and voluntary work during imprisonment.

Legal certainty would be completely satisfied if ECtHR extended the meaning of the penalty to encompass not only the penalty imposed, but also the measures that amount to the enforcement of that penalty. If so, there would still not be any impediments for the state to change the regulations, administrative acts and practice governing the execution. However, as Article 7 would cover the question of execution as well, it would simply mean that on convicts should be applied only regulations and rules concerning the execution that were in force at the time the criminal offence was committed. When they change over time, the new penal policy must be applied prospectively.

From the hard line decision in *Hogben*, continuing with the perplexing *Kafkaris* to finally surprising *del Río Prada*, ECtHR has steadily departed from its previous reasoning and developed a more open-minded approach to the concepts of penalty and the enforcement of penalty to the individual’s benefit.¹²¹ It seems only rational to propose that ECtHR should consider abjuring this unnecessary and completely theoretical differentiation. Should that be deemed as unacceptable, ECtHR ought to be once and for all called upon to specify where is the dividing line between the penalty and its enforcement to be drawn and explain how this doctrine contributes to the protection of human rights.

4. MORE FAVOURABLE LAW, BUT FOR WHOM?

Another question that ECtHR necessarily had to address at one point is whether the right to a more favourable penalty provided for in a law subsequent to the offence was included in Article 7. Back in the 1978, the European Commission

¹²⁰ Murphy, *op. cit.*, note 25, p. 206

¹²¹ Sanz-Caballero, *op. cit.*, note 65, p. 817

of Human Rights had answered it in the negative¹²² and that ruling has been repeated by ECtHR¹²³. However, ECtHR departed from it in *Scoppola v. Italy* (No. 2), when affirmed that Article 7 not only affords protection from the non-retrospectiveness of more stringent criminal law, but also implicitly guarantees the retrospectiveness of more lenient criminal law.¹²⁴

The case involved a man who was found guilty for several offences including murder, attempted murder and ill-treatment of his family, hence convicted to life imprisonment.¹²⁵ Having elected to stand trial under the summary procedure, which, according to the Code of Criminal Procedure, allowed for a reduction of the penalty, a more lenient sentence was applied on him – imprisonment for a term of 30 years.¹²⁶ On the very day that he was convicted, the Code of Criminal Procedure was modified in a way of hardening the regime of imprisonment for any convicted person liable of serious cumulative offences.¹²⁷ Conform to the new norm, in the event of trial under the summary procedure, life imprisonment was to be replaced with life imprisonment with daytime isolation.¹²⁸ Consequently, the higher instance national court considered that the applicant should have not been subject to 30 years imprisonment but rather, to life imprisonment with daytime isolation.¹²⁹ It took the view that new changes had to be applied to any pending procedure, since their nature was procedural and not substantial, as it had only modified the Code of Criminal Procedure, not the Criminal Code.¹³⁰ It also took into account that the applicant made his choice by opting to be judged under the summary procedure and although he could have withdrawn that request, he had not.¹³¹

Firstly, ECtHR considered that ‘a long time has elapsed since the Commission gave the *X v. Germany* decision and that during that time there have been important developments internationally’.¹³² Apart from the entry into force of the American Convention on Human Rights, that guarantees the retrospective effect of a law providing for a more lenient penalty enacted after the commission of the relevant offence, ECtHR emphasized the wording of Article 49 of the European

¹²² *X v. Germany* (1978) 12 Decisions 6-Reports

¹²³ *Le Petit v. United Kingdom* (2000) ECHR 714; *Zaprianov v. Bulgaria* (2003) ECHR 730

¹²⁴ *Scoppola v. Italy* (No. 2) (2009) 51 EHRR 12

¹²⁵ *Ibid.*, para. 13

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, para. 15

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, para. 21

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*, para. 105

Union's Charter of Fundamental Rights that states: 'If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable'.¹³³ It went further to cite the Court of Justice of the European Union (hereinafter: CJEU) in the case of *Berlusconi and Others*: 'The principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States. It follows that this principle must be regarded as forming part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law'.¹³⁴ CJEU did confirm this interpretation¹³⁵ and ECtHR reminded that the ruling was also endorsed by the French Court of Cassation.¹³⁶ Unusually, ECtHR allowed and acknowledged the remarkable impact of the EU's Charter of Fundamental Rights and decisions of the CJEU on its reasoning. Truth be told, CJEU had developed significant jurisprudence concerning the right to have the more lenient penalty applied.¹³⁷ In this regard, ECtHR also cited the statute of the ICC and the judgment of the ICTY.¹³⁸ Concludingly, since the *X v. Germany* decision 'a consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law'.¹³⁹ ECtHR admitted that Article 7 does not expressly mention an obligation for Contracting States to grant an accused the benefit of a change in the law subsequent to the commission of the offence and explained that it was precisely on the basis of that argument that the Commission rejected the applicant's complaint in the case of *X v. Germany*.¹⁴⁰ However, after considering all the circumstances mentioned above, ECtHR rejected that argument and contrarily stressed that in prohibiting the imposition of 'a heavier penalty ... than the one that was applicable at the time the criminal

¹³³ *Ibid.*

¹³⁴ *Ibid.*, paras. 105, 38. See Joined Cases C-387/02, C-391/02, and C-403/02 *Berlusconi, Adelchi, Dell'Utri and others* [2005] ECR, I-3624, paras. 68–69

¹³⁵ Joined Cases C-23/03, C-52/03, C-133/03, C-337/03 and C-473/03 *Mulliez and Others* [2006] ECR I-3925

¹³⁶ *Scoppola v. Italy (No. 2)*, *op. cit.*, note 60, para. 38

¹³⁷ Lock, T., *Articles 48-50*, in: Kellerbauer M. *et. al.* (eds.), *Commentary on the EU Treaties and the Charter of Fundamental Rights*, Oxford University Press, 2019, pp. 2233-2234. The more lenient penalty can result from either a change in the classification of the act concerned or the penalty applied to the offence, Case C-218/15, *Paoletti*, EU:C:2016:748, para. 27. However, where an individual had been convicted when the more lenient penalty was introduced, that individual does not benefit from the right to have the more lenient penalty applied, unless specific provision has been made for such an entitlement, Case C-650/13, *Delvigne*, EU:C:2015:648, para. 56

¹³⁸ *Scoppola v. Italy (No. 2)*, *op. cit.*, note 60, paras. 40-1, 105

¹³⁹ *Ibid.*, para. 106

¹⁴⁰ *Ibid.*, para. 107

offence was committed', paragraph 1 *in fine* of Article 7 does not exclude granting the accused the benefit of a more lenient sentence, prescribed by legislation subsequent to the offence.¹⁴¹ Furthermore, inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant's detriment the rules governing the succession of criminal laws in time.¹⁴² In addition, it would amount to disregarding any legislative change favourable to the accused which might have come in before the conviction and continuing to impose penalties which the State – and the community it represents – now consider excessive.¹⁴³ ECtHR finally ascertained that the obligation to apply, from among several criminal laws, the one whose provisions are the most favourable to the accused is a clarification of the rules on the succession of criminal laws, which is in accordance with another essential element of Article 7, namely the foreseeability of penalties.¹⁴⁴

Unsurprisingly, this radical change in the ECtHR's approach to Article 7 was not accepted without criticism. For example, some judges invoked the *travaux préparatoires* of the Convention and previous case-law in arguing that the majority went beyond its powers to widen the interpretation of Article 7 and have actually rewritten it to comply with what they thought was respecting the limits set by the Convention provisions.¹⁴⁵ In other words, the majority have overstepped the limits of judicial interpretation.¹⁴⁶

Furthermore, it is quite questionable whether 'law more favourable to the accused' is subjective or objective category. The weight of the penalty should not generate serious concern as long as one is dealing with the same type of the penalty.¹⁴⁷ On

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, para. 108

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ "The conflict of opinion in the present case should not be attributed to a difference in our interpretative approach to Article 7. We all profess adherence to the relevant international rules embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 and the view that we, as minority, take of Article 7(1) does not call in question the Court's case-law, to which the majority briefly refer, either on reversing previous decisions, where necessary, or of adapting to changing conditions and responding to some emerging consensus on new standards since, as is often emphasized, the Convention is a living instrument requiring a dynamic and evolutive approach that renders rights practical and effective, not theoretical and illusory. But no judicial interpretation, however creative, can be entirely free of constraints. Most importantly it is necessary to keep within the limits set by Convention provisions", Partly Dissenting Opinion of Judge Nicolaou, joined by Judge Bratza, Lorenzen, Jociene, Villiger and Sajo, pp. 46-47

¹⁴⁶ *Ibid.*

¹⁴⁷ See also Nowak, M., *UN Covenant on Civil and Political Rights – CCPR Commentary*, Engel, 1993, pp. 365-367

the other hand, if a law is amended so that a penalty of imprisonment becomes a fine, it can be reasonably expected that for some the short term of imprisonment is less severe sentence than a considerable fine, while for others just the opposite.¹⁴⁸ So the question is – who is the one to decide what is more favourable to the particular person and what are the criteria that have to be taken into account while rendering such a decision?

Finally, some authors raised concern that literal reading of Article 15 of the International Covenant on Civil and Political Rights as well as Article 9 of American Convention on Human Rights, which provide for the retroactivity of the lighter penalty, does not allow the offender to benefit from the decriminalization of his or her act.¹⁴⁹ Simply put, what would happen in a situation where the offender is already serving the sentence at the moment of the decriminalization of his act?¹⁵⁰ Since the Article 7 does not explicitly guarantee neither ‘the retroactivity of the lighter penalty’ nor ‘application of the more favourable law’ it is entirely up to ECtHR to illuminate all of these issues.

5. MIRROR, MIRROR ON THE WALL – WHAT AMOUNTS TO PROCEDURE LAW OF THEM ALL?

It is no secret that the prohibition of retroactive application of criminal law pertains only to substantive law, while in procedural law it is the *tempus regit actum* principle that rules.

In view of that fact, *Scoppola v. Italy (No. 2)* is once again a remarkable judgment.

¹⁴⁸ Mokhtar, *op. cit.*, note 5, p. 50

¹⁴⁹ *Ibid.*, p. 49

¹⁵⁰ Thought-provokingly, Mokhtar expressed an opinion that the human rights perspective on such a case would be that this person should discontinue serving the sentence and should be freed, since decriminalizing an act actually implies that the legislature was wrong to criminalize it in a previous law, *ibid.* That is at least highly debatable, since the reasons for decriminalization can be diverse. A society may come to the view that an act is not harmful enough, should no longer be criminalized due to the change of social and moral standards or for another reason is no longer a matter to be addressed by the criminal law. However, that does not necessarily mean that at the time of the commission, the particular act did not deserve to be punished (according to the social apprehensions at the relevant time). And even so, it remains unclear which legal institutes should be used in order to revoke an irrevocable judgment.

^For instance, from the standpoint of the Supreme Court of Cassation of the Republic of Serbia, the prohibition of retrospective application of criminal law, including the principle of ‘law more favourable to the accused’, can only be applied until the judgment becomes final. After that moment, it held that there is no violation of right if the national authorities apply the statutory law concerning the conditional release, which is less favourable to the convict and that was adopted after the commission of the offence, Supreme Court of Cassation of the Republic of Serbia, Judgment of 13 June 2019, Kzz 587/2019

To begin with, ECtHR reiterated that the rules on retrospectiveness set out in Article 7 apply only to provisions defining offences and the penalties for them, while held that it is reasonable for domestic courts to apply the *tempus regit actum* principle with regard to procedural laws.¹⁵¹ Nevertheless, the Grand Chamber clarified that criminal norms are not only criminal norms because they are set down in a Criminal Code and likewise, procedure norms are not only procedure norms because they are established in a Code of Criminal Procedure.¹⁵² The classification in domestic law of the legislation concerned cannot be decisive.¹⁵³ As a result, in the case discussed, ECtHR considered that the relevant norms governing summary procedure, although part of the Code of Criminal Procedure, actually concerned the length of the sentence to be imposed, hence fall within the scope of Article 7.¹⁵⁴

This ruling has twofold consequences. On the one hand, it puts national courts in a rather difficult position, since ECtHR did not provide with detailed instructions concerning qualification of a norm as substantive or procedural, but on the other, it leaves an open window for a more flexible approach to the prohibition of retroactive application of criminal law.

At this point, it is worth recalling that very long ago, in 1798, it was the United States Supreme Court who identified four categories of *ex post facto* laws: any law that criminalizes an act after the time it was committed and which punishes such action; any law that aggravates a crime, or makes it greater than it was at the time it was committed; any law that changes the punishment, thus inflicting a greater punishment than that which existed at the time the crime was committed; *any law that alters the legal rules of evidence, thus accepting less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender.*¹⁵⁵ Far from accepting the retroactive application of the procedural rules, this court just recognised that ‘any alternation of the legal rules of evidence which would authorize conviction upon less proof, in amount of degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *ex post facto* laws’¹⁵⁶.

Back to the present, let us imagine that there was a murder. The corpse was found, but the investigation was unsuccessful for years – no trace of the perpetra-

¹⁵¹ *Scoppola v. Italy (No. 2)*, *op. cit.*, note 60, para. 110

¹⁵² *Ibid.*, para. 111

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*, paras. 111, 113

¹⁵⁵ *Calder v. Bull* (1798) 3 US (3 Dall.) 386, 390

¹⁵⁶ *Hopt v. Utah* (1884) 110 US 574, 590

tor. However, one sunny day a new legal institute was introduced in the national criminal legal system, in particular the ‘co-operative witness’. And all of the sudden, due to the co-operator’s testimony, our perpetrator was identified, found and convicted at short notice. So, due to the retroactive application of the new legal institute, which commonly amounts to the procedure law, as being a part of the rules of evidence, a person was arrested and sentenced. The same person that would probably have never been even identified let alone prosecuted had the new institute not been introduced and retroactively applied.

This being said, it can be argued that an evidentiary change may also run afoul of the *ex post facto* prohibition if it increases the likelihood of the conviction to such an extent as virtually to guarantee it.¹⁵⁷

Of course, it must be admitted that ECtHR was pretty clear when stipulated that, for instance, change in a statute of limitations rule to the detriment of an accused in pending proceedings is not a breach of Article 7, because changes in procedural rules generally have immediate application in national law¹⁵⁸ or that the rules concerning the use of witness statements constitute procedural rules, since they do not indicate either the constituent element of the offence or the penalty to be imposed in the event of the conviction¹⁵⁹. But, it was also very explicit when asserted that Article 7 does not prevent any retroactive alteration in the law or practice concerning remission or any other aspect of the execution of the penalty to the detriment of the defendant¹⁶⁰ and yet we are all aware of the change of course in *del Rio Prada*.

After all, taking into account that ECtHR accepted the approach of ‘law more favourable to the accused’, it may be reasonable to reconsider why would this perspective be limited only to the penalty and not extended to all of the aspects of the position of the defendant, primarily to the rules regarding the evidence. The fact is that the defendant always has a weaker position in the criminal proceedings, so it does not seem too unfair to allow him/her to at least know the rules that will be applied, either substantial or procedural. Even more so, if we consider the above-mentioned hypothetical example that shows how some changes in the evidentiary

¹⁵⁷ Adler J. T., D., *Ex Post Facto Limitations of Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements*, Fordham Law Review, vol. 55, no. 6, 1987, p. 1211

¹⁵⁸ *Coëme and Others v. Belgium*, *op. cit.*, note 27, para. 149. However, the legal nature of statute of limitations can be at least described as hybrid or mixed, having both substantial and procedural aspects. For more see *Research Note – Limitation rules in criminal matters*, Directorate-General for Library, Research and Documentation, European Court of Justice, 2017, pp. 1-22

¹⁵⁹ *Bosti v. Italy* (2014) Dec. 43952/09, para. 55

¹⁶⁰ *Kafkaris v. Cyprus*, *op. cit.*, note 66, para. 142

norms may be significantly detrimental for the defendant, maybe more detrimental than some changes in the substantial law. Given that Article 7 was conceived as a protection from arbitrary prosecution and a limitation of tremendous powers of the state, why would it allow the state to change the rules of the criminal procedure during the procedure? With all due respect, it is rather difficult to understand how such an approach contributes to the respect and observance of human rights.

Therefore, hope remains that ECtHR will not wait for a consensus to gradually emerge in Europe and internationally around the view that the prohibition of retroactive application of criminal law should be interpreted extensively so that it encompasses other legal institutes and rules, such as the norms governing the evidentiary procedure, but that it will take the lead as many times before and extend the scope of Article 7 once again, beyond its outdated limits.

6. CONCLUSION

The principle of legality embodied in Article 7 constitutes a foundation of any criminal justice system that strives to be in accordance with the rule of law. Indisputably, it is aimed at shielding individuals from arbitrary prosecution, conviction and punishment. However, Article 7 has still not reached its full potential. One of the reasons may be a surprisingly conservative approach that has ECtHR adopted regarding this matter, even to the point of handing down judgments that lack any real effect. An obvious example is *Kafkaris* case, which was so criticized that some even argued, and not unfoundedly, that it undermined both the absolute nature of the Article 7 and the value of the Convention system in general.¹⁶¹

Greater attention has to be paid to the foreseeability, a pretty clear requirement, that has unfortunately not been consistently applied in regard to Article 7. On the other hand, ECtHR was persistent in insisting on the distinction between the ‘penalty’ and the ‘enforcement of a penalty’, a completely blurred construction, whose neither theoretical nor practical value was so far discovered.

On the bright side, inclusion of the *lex mitior* rule within the scope of Article 7 is a promising example of evaluative interpretation used by ECtHR. Over time, with *Scoppola* ruling, it has departed from its previously established case-law and came to realise that a defendant should be able to benefit from a subsequent criminal law providing for a more lenient penalty. However, an issue urging further clarification is concerning the actual scope of the principle ‘law most favourable to the accused’ and the identification of the criteria by which it is to be determined.

¹⁶¹ Murphy, *op. cit.*, note 25, p. 208

This new anti-formalistic point of view was also reflected in *del Rio Prada*, a valuable judgment indicating that even ECtHR is not fully convinced in its own doctrine concerning the distinction between the ‘penalty’ and the ‘enforcement of a penalty’. Given that this differentiation in no way contributes to the protection of human rights, ECtHR should seriously consider rejecting it and extending the scope of Article 7 on all forms of the enforcement of the penalty. There is really nothing unreasonable in demanding that only rules that were in force at the time of the offence are to be applied on the convicts, even during the execution of their sentence, since legal certainty is the very essence of Article 7.

Finally, quite flexible reasoning in *Scoppola* and *del Rio Prada* retained faith that ECtHR, an organ otherwise known for its leadership role and innovative insights, will gain strength to realize that the only way for Article 7 to start to truly fulfill its mission is to widen its scope to other legal institutes and norms that are not tightly connected to the offence or the penalty, but are still of immense importance for the position of the defendant, such are the rules concerning evidence. ECtHR should encourage national authorities to analyze ‘intrinsic nature’ of the particular norm, even if it appears to be of the procedural character, before they decide to retroactively apply it to the defendant’s detriment.

Ultimately, despite the broad freedom that states obviously enjoy in determining their own criminal policies, both legislative and judicial changes have to respect the principle of non-retroactivity, unless they benefit to the accused.

REFERENCES

BOOKS AND ARTICLES

1. Adler J. T., D., *Ex Post Facto Limitations of Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements*, Fordham Law Review, vol. 55, no. 6, 1987, pp. 1191- 1220
2. Ashworth, A., *Principles of Criminal Law*, Oxford University Press, 2003
3. Cassese, A., *Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law*, Journal of International Criminal Justice, vol. 4, 2006, pp. 410-418
4. Cassese, A., *International Criminal Law*, Oxford University Press, 2003
5. Francioni, F., *Crimini internazionali*, Digesto delle Discipline Pubblicistiche, Vol. IV, 1989
6. Greer, S., *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge University Press, 2006, pp. 232-241
7. Harris, D.J., *et al.*, *Law of the European Convention on Human Rights*, Oxford University Press, 2018, pp. 491-500
8. Kreća, M., *Međunarodno javno pravo*, Pravni fakultet Univerziteta u Beogradu, 2014
9. Lock, T., *Articles 48-50*, in: Kellerbauer M. *et. al.* (eds.), *Commentary on the EU Treaties and the Charter of Fundamental Rights*, Oxford University Press, 2019, pp. 2227-2241

10. Mariniello, T., *The 'Nuremberg Clause' and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence*, Nordic Journal of International Law, vol. 82, 2013, pp. 221-248
11. Mokhtar, A., *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, Statute Law Review, vol. 26, no. 1, 2005, pp. 41-55
12. Murphy, C. C., *The Principle of Legality in Criminal Law under the ECtHR*, European Human Rights Law Review, vol. 2, 2010, pp. 192-210
13. Nowak, M., *UN Covenant on Civil and Political Rights – CCPR Commentary*, Engel, 1993
14. Rauter, T., *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, Springer, 2017, pp. 19-86
15. *Research Note – Limitation rules in criminal matters*, Directorate-General for Library, Research and Documentation, European Court of Justice, 2017, 1-22
16. Rychlewska, A., *The Nullum Crimen Sine Lege Principle in the European Convention of Human Rights: The Actual Scope of Guarantees*, Polish Yearbook of International Law, vol. 36, 2016, pp. 163-208
17. Sanz-Caballero, S., *The Principle of Nulla Poena Sine Lege Revisited: The Retrospective Application of Criminal Law in the Eyes of the European Court of Human Rights*, European Journal of International Law, vol. 28, no. 3, 2017, pp. 787-817
18. Shabas, W., *Perverse Effects of the Nulla Poena Principle: National Practice and the Ad Hoc Tribunals*, European Journal of International Law, vol. 11, no. 3, 2000, pp. 521-539
19. Shahabudeen, M., *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, Journal of International Criminal Justice, vol. 2, no. 4, 2004, pp. 1007-1017
20. van der Wilt, H., *Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test*, Nordic Journal of International Law, vol. 84, 2015, pp. 515-531
21. Virjan, B., *Principle of Non-Retroactivity of Criminal Law According to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Law Annals of Titu Maiorescu University, 2012, pp. 95-105

INTERNATIONAL TREATIES

1. African Charter on Human and Peoples' Rights, *Organisation of African Unity (OAU)*
2. American Convention on Human Rights, *Organisation of American States (OAS)*
3. Charter of Fundamental Rights of the European Union, 2012/C 326/02
4. European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
5. International Covenant on Civil and Political Rights, *UN Treaty Series*, vol. 999, p. 171

EUROPEAN COURT OF HUMAN RIGHTS

1. *Achour v. France* (2006) 45 EHRR 2
2. *Airey v. Ireland* (1979) 2 EHRR 305
3. *Amuur v. France* (1996) 22 EHRR 533

4. *Başkaya and Okçuoğlu v. Turkey* (1999) ECHR 42
5. *Bosti v. Italy* (2014) Dec. 43952/09
6. *C.R. v. United Kingdom* (1995) 21 EHRR 36
7. *Coëme and Others v. Belgium* (2000) ECHR 2000-VII
8. *De Wilde, Ooms and Versyp v. Belgium* (1971) 1 EHRR 435
9. *Del Rio Prada v. Spain* (2013) 58 EHRR 37
10. *Hogben v. United Kingdom* (1986) 46 DR 231
11. *Kafkaris v. Cyprus* (2008) 49 EHRR 877
12. *Kasymakhunov and Saybatalov v. Russia* (2013) ECHR 217
13. *Kokkinakis v. Greece* (1993) 17 EHRR 397
14. *Kononov v. Latvia* (2010) ECHR 667
15. *Korbely v. Hungary* (2008) ECHR 847
16. *Kruslin v. France* (1990) 12 EHRR 547
17. *Le Petit v. United Kingdom* (2000) ECHR 714
18. *Leyla Sahin v. Turkey* (2005) 44 EHRR 5
19. *S.W. v. United Kingdom* (1995) 21 EHRR 363
20. *Scoppola v. Italy (No. 2)* (2009) 51 EHRR 12
21. *Soros v. France* (2011) ECHR 172
22. *Streletz, Kessler and Krenz v. Germany* (2001) ECHR 2001-II
23. *Sunday Times v. United Kingdom* (1979) 2 EHRR 245
24. *T. and V. v. United Kingdom* (1999) 30 EHRR 121
25. *Vasiliauskas v. Lithuania* (2015) ECHR 332
26. *Vinter and Others v. United Kingdom* (2013) ECHR 645
27. *Weeks v. United Kingdom*, 9787/82, Commission Report, 7 December 1984
28. *Welch v. United Kingdom* (1995) 20 EHRR 247
29. *X Ltd. and Y v. United Kingdom* (1982) 28 DR 77
30. *X v. Germany* (1978) 12 Decisions 6-Reports
31. *Zaprianov v. Bulgaria* (2003) ECHR 730

COURT OF JUSTICE OF THE EUROPEAN UNION

1. Case C-218/15, *Paoletti*, EU:C:2016:748
2. Case C-650/13, *Delvigne*, EU:C:2015:648
3. Joined Cases C-23/03, C-52/03, C-133/03, C-337/03 and C-473/03 *Mulliez and Others* [2006] ECR I-3925
4. Joined Cases C-387/02, C-391/02, and C-403/02 *Berlusconi, Adelchi, Dell'Utri and others* [2005] ECR, I-3624

OTHER CASE-LAW

1. *Calder v. Bull* (1798) 3 US (3 Dall.) 386, 390
2. *France et al. v. Goering et al.* (1946) 22 IMT
3. *Hopt v. Utah* (1884) 110 US 574, 590
4. Supreme Court of Cassation of the Republic of Serbia, Judgment of 13 June 2019, Kzz 587/2019