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# *The Principle of Nulla Poena Sine Lege Revisited: The Retrospective Application of Criminal Law in the Eyes of the European Court of Human Rights*

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## **Abstract**

*This article deals with the application by the European Court of Human Rights (ECtHR) of the principle nulla poena sine lege, which is enshrined in Article 7 of the European Convention on Human Rights, in two cases against Cyprus and Spain – Kafkaris v. Republic of Cyprus of 12 February 2008 and Inés del Río Prada v. Spain of 21 October 2013. To do so, the article frames the evolution of the Court's case law before the two rulings. The article revises the existing Strasbourg doctrine on the contents of Article 7(1) and analyses how this doctrine has been particularly applied in the two cases where the applicants, two unrepentant murderers, requested an early release from the state authorities. The article compares the facts under scrutiny, the legal reasoning of the ECtHR and the final verdict in both cases and tries to shed some light on the shift in Strasbourg case law from Kafkaris to del Río Prada.*

## **1 Introduction**

The emission of the judgment of the European Court of Human Rights (ECtHR) in *Inés del Río Prada v. Spain* of 21 October 2013 has given rise to a new chapter in the

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European debate on the illegality of the retrospective application of criminal law.<sup>1</sup> It also raises issues concerning its compatibility with the previous case law of the Court, especially *Kafkaris v. Cyprus* of 12 February 2008.<sup>2</sup> The purpose of this contribution is twofold: first, to calibrate the impact of the ruling of the Grand Chamber of the ECtHR in *del Río Prada* on the overall evolution of the Court's case law concerning the non-retroactivity of criminal law and, second, to identify the symmetries and asymmetries between this ruling and that of the Grand Chamber in *Kafkaris*, which can be considered to be an intermediate step in this evolution.

The article will first analyse Article 7 of the European Convention on Human Rights (ECHR) – no punishment without law – as its phrasing has been interpreted by the Court up to the present. Second, the contribution will embark on a historical *excursus* of the relevant case law of the ECtHR, especially in connection with the principle *nulla poena sine lege*. Third, the contribution will present in detail the facts under scrutiny and the legal reasoning of *Kafkaris*, a case where the Grand Chamber paved the way for a more generous interpretation of the term 'penalty'. Fourth, the contribution will present in detail the facts under scrutiny and the legal reasoning of the Court in *del Río Prada* and will consider the question whether the current approach to the principle of legality entails a risk stemming from the vagueness of the 'foreseeability' test. Fifth, the article will shed some light on the symmetries and asymmetries of both cases, since *Kafkaris* provided a more flexible notion of 'penalty' that the Grand Chamber bluntly applied later in *del Río Prada*, giving rise to the current anti-formalistic approach of the Court. While welcoming the Grand Chamber's decision to release Inés del Río Prada, the contribution will conclude that the differences between the two cases were not such as to justify the different outcome, as Mr. Kafkaris was not released.

## 2 Scope and Contours of Article 7(1) of the ECHR

Article 7 includes two explicit principles – namely, a criminal conviction should only be based on a norm that existed at the time the incriminating act or omission took place (*nullum crimen sine lege*) and no heavier penalty may be imposed than the penalty applicable at the time the offence was committed (*nulla poena sine lege*). But Article 7 implicitly includes a third principle that was identified by the ECtHR through its case law – namely, the authority applying criminal law should not interpret it extensively to the defendant's detriment, for instance, by analogy *in malam partem*.<sup>3</sup> Accordingly, an offence must be clearly defined by law.<sup>4</sup> Article 7 establishes that only the law can

<sup>1</sup> ECtHR, *Inés del Río Prada v. Spain*, Appl. no. 42750/09, Judgment of 21 October 2013. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

<sup>2</sup> ECtHR, *Kafkaris v. Cyprus*, Appl. no. 21906/04, Judgment of 12 February 2008.

<sup>3</sup> As stated by Scalia, today retroactivity is accepted in regard to the accused's benefit because it is in the spirit of the ECtHR (although not in the text). However, for years, it was only recognized in a hesitant way. Scalia, 'L'application du principe de légalité des peines aux crimes (les plus) graves: l'orthodoxie retrouvée', 99 *Revue Trimestrielle des droits de l'homme (RTDH)* (2014) 689, at 700.

<sup>4</sup> On the principle *nullum crimen, nulla poena sine lege*, vide, see P. Van Dijk *et al.* (eds), *Theory and Practice of the European Convention on Human Rights* (2006), at 651; van Drooghenbroek, 'Droit pénal et droits de

define a crime and prescribe a penalty. It offers 'essential safeguards against arbitrary prosecution, conviction and punishment'.<sup>5</sup> It is one of the few provisions of the ECHR that cannot be an object of exceptions or of a derogatory regime in the case of war or internal disturbances.<sup>6</sup> In other words, it is one of the human rights that are embedded solidly within the Convention. It is one of the provisions that guarantee that the principle of legality will be respected.<sup>7</sup> The ECtHR underlines that the guarantee enshrined in Article 7 is an essential element of the rule of law. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrariness.<sup>8</sup> While it especially prohibits enlarging the scope of existing offences to include acts that were previously not criminal offences, it also establishes the principle that criminal law must not be extensively construed to the accused's detriment – for instance, by analogy.<sup>9</sup>

In their applications before the ECtHR, individuals rarely base their arguments on a possible breach of Article 7. Compared to other provisions such as Articles 5, 6 or 8, Article 7 is, by far, the provision that has given rise to less controversy within the Strasbourg Court. The first consequence to be derived is that European states do not generally apply retroactive criminal norms to the person's detriment, which is correct. But the few cases in which the ECtHR found a violation of this provision have often been notorious and have generated social alarm.<sup>10</sup> The very foundations of the rule of law are at stake when a state retroactively applies a norm that inflicts a penalty for an act or omission that was not punishable at the time it was committed or that inflicts a harsher penalty than the one in force at that time.

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l'homme: le point de vue de la Cour Européenne des Droits de l'Homme', in Y. Cartouyvels *et al.* (eds), *Les droits de l'homme, bouclier ou épée du droit pénal?* (2007) 75, at 102; F. Sudre *et al.*, *Les grandes arrêts de la CEDH* (2003), at 315; Koering-Joulin and Truche, 'Retour sur le champ pénal européen', in *Mélanges en hommage à Louis Edmond Pettiti* (1998) 513, at 532; Olásolo Alonso, 'El principio nullum crimen sine lege en derecho internacional contemporáneo', 1 *Anuario Ibero-Americano de Derecho Internacional Penal* (2013) 18; F. Quilleré-Majzoub, *La défense du droit à un procès équitable* (1999), at 148; E. Jacobs and R. White, *The European Convention on Human Rights* (1996), at 162; G. Cohen-Jonathan, *La CEDH* (1989), at 446; Schabas, 'Perverse Effects of the nulla poena Principle: National Practice and the Ad Hoc Tribunals', 11 *European Journal of International Law* 3 (2000) 521, at 522; Rolland, 'Article 7', in L.-E. Pettiti (ed.), *La CEDH: Commentaire article par article* (1995) 293; V. Berger, *Jurisprudence de la CEDH* (2000).

<sup>5</sup> ECtHR, *Kokkinakis v. Greece*, Appl. no. 14307/88, Judgment of 25 May 1993, para. 52.

<sup>6</sup> Art. 15(2) of the ECHR establishes that no derogation shall be made in Arts 2, 3, 4(1) and 7.

<sup>7</sup> F. Sudre, *Droit Européen et International des Droits de l'Homme* (1989), at 419; J.F. Renucci, *Droit Européen des Droits de l'Homme* (6th edn, 2015), at 273; E. Claes, 'La légalité criminelle à l'égard des droits de l'homme et du respect de la dignité humaine', in Cartouyvels *et al.*, *supra* note 4, 211, at 215; S. van Drooghenbroek, *La CEDH: Trois années de jurisprudence de la Cour Européenne des Droits de l'Homme 1999–2001* (2003), at 133; L. Burgorgue-Larsen, *La Convention Européenne des Droits de l'Homme* (2012), at 93; Gavouneli, 'Introductory Note to the ECHR Decision: *Ould Dah v. France*', 48 *International Legal Materials* (2009) 869, at 869.

<sup>8</sup> ECtHR, *S.W. v. United Kingdom*, Appl. no. 20166/92, Judgment of 22 November 1995, para. 35.

<sup>9</sup> ECtHR, *Coëme and Others v. Belgium*, Appl. nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment of 22 June 2000, para. 145.

<sup>10</sup> Among others, ECtHR, *M. v. Germany*, Appl. no. 19359/04, Judgment of 17 December 2009; *del Río Prada*, *supra* note 1.

The term ‘law’ in Article 7 has the same meaning and interpretation as it does when found elsewhere in the ECHR. It is a concept comprising both statute law and case law.<sup>11</sup> The Court has always understood the term ‘law’ in a ‘substantive’ sense, not in a ‘formal’ one. It includes enactments of lower rank and statutes as well as unwritten norms.<sup>12</sup> The Court has also enlarged the concept of ‘law’ (and has thereby intensified the protection provided by the Convention) in order to include both legislative and judicial measures.<sup>13</sup> In short, the ‘law’ is the provision in force as the competent courts have interpreted.<sup>14</sup>

The term ‘law’ implies qualitative requirements, including those of accessibility and foreseeability.<sup>15</sup> These qualitative requirements must be satisfied with respect to both the definition of an offence and the penalty the offence in question carries with it.<sup>16</sup> An individual must understand from the wording of the relevant provision, and, if need be, with the assistance of the courts’ interpretation, which acts and omissions will make him or her criminally liable and what penalty will be imposed for the act committed and/or the omission. A law may still satisfy the requirement of ‘foreseeability’ where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences that a given action may entail.<sup>17</sup>

No matter how clearly drafted a legal provision may be in any legal system, there is an inevitable element of judicial interpretation. There will always be a need for the elucidation of ambiguous points and for adaptation to changing circumstances. Certainty is desirable, but it may also imply rigidity, and the law must always adapt to changing circumstances. Accordingly, many laws and regulations are inevitably drafted in terms that, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.<sup>18</sup> The adjudication role vested in the courts has precisely the objective of dissipating such interpretational doubts. Article 7 of the ECHR 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’.<sup>19</sup>

The concept of ‘penalty’ in Article 7 is, like the notions of ‘civil rights and obligations’ and ‘criminal charge’ in Article 6(1), of the ECHR, autonomous in scope. To

<sup>11</sup> ECtHR, *Sunday Times v. United Kingdom (no. 1)*, Appl. no. 6538/74, Judgment of 26 April 1979, para. 47; ECtHR, *Kruslin v. France*, Appl. no. 11801/85, Judgment of 24 April 1990, para. 29.

<sup>12</sup> ECtHR, *De Wilde, Ooms and Versyp v. Belgium*, Appl. nos 2832/66; 2835/66 and 2899/66, Judgment of 18 June 1971, para. 93.

<sup>13</sup> Scalia, *supra* note 3, at 690.

<sup>14</sup> ECtHR, *Leyla Şahin v. Turkey*, Appl. no. 44774/98, Judgment of 10 November 2005, para. 88.

<sup>15</sup> *Coëme and Others*, *supra* note 9, para. 145.

<sup>16</sup> ECtHR, *Achour v. France*, Appl. no. 67335/01, Judgment of 29 March 2006, para. 41.

<sup>17</sup> *Ibid.*, para. 54.

<sup>18</sup> *Sunday Times*, *supra* note 11, para. 49; *Kokkinakis*, *supra* note 5, para. 40.

<sup>19</sup> ECtHR, *Streletz, Kessler and Krenz v. Germany*, Appl. nos 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, para. 50.

render the protection afforded by Article 7 effectively, the Court must remain free to go beyond appearances and assess for itself whether a particular measure amounts in substance to a 'penalty' within the meaning of this provision.<sup>20</sup> The wording of the second sentence of Article 7(1) indicates that the starting point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a 'criminal offence'. Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question, its characterization under national law, the procedures involved in the making and implementation of the measure and its severity.<sup>21</sup> To this end, both the European Commission on Human Rights and the ECtHR have drawn a distinction in their case law between a measure that constitutes in substance a 'penalty' and a measure that concerns the 'execution' or 'enforcement' of the 'penalty'. Where the nature and purpose of a measure relates to the remission of a sentence or a change in the regime for early release, this does not form part of the 'penalty' within the meaning of Article 7.<sup>22</sup> However, in practice, the distinction between the two may not always be clear-cut.<sup>23</sup> The absolute ban of retroactivity to the accused's detriment refers to the 'imposition' of the penalty.

### 3 The Evolution of the Case Law of the ECtHR Concerning Article 7(1)

To date, the ECtHR has not been called to solve many cases on a supposed violation of the principle of legality and, more specifically, on the principle *nulla poena sine lege*. The reasoning of the Court has moved towards an expanded understanding of the term 'penalty' in the accused's benefit, of which the verdict in *del Río Prada* is the final exponent so far.<sup>24</sup>

#### A A Precedent at the European Commission on Human Rights

During the last few decades, the European Commission on Human Rights has played an important role in the development of the so-called Strasbourg case law – that is, the case law derived from the application of the ECHR by the organs established under this Convention. Concerning the principle *nulla poena sine lege*, the Commission had a say in the application *Hogben v. United Kingdom*, which was finally declared inadmissible.<sup>25</sup>

<sup>20</sup> ECtHR, *Welch v. United Kingdom*, Appl. no. 17440/90, Judgment of 9 February 1995, para. 27.

<sup>21</sup> *Ibid.*, para. 28.

<sup>22</sup> European Commission on Human Rights, *Hosein v. United Kingdom*, Appl. no. 26293/95, Judgment of 28 February 1996.

<sup>23</sup> Scalia, *supra* note 3, at 705: 'La Cour oblige ainsi à poser la question de la pertinence de sa jurisprudence antérieure établissant cette distinction [entre "peine" et "mesures d'exécution de peine"].'

<sup>24</sup> As an example, the HUDOC database indicated on 22 May 2017 more than 28,000 cases on Art. 6 but less than 500 on Art. 7.

<sup>25</sup> European Commission of Human Rights, *Hogben v. United Kingdom*, Appl. no. 11653/85, Judgment of 3 March 1986.

In order to give reasons for the rejection of the case, the Commission developed what could be considered the first Strasbourg doctrine concerning retrospective punishment, a doctrine that was strict and rigid to the applicant's detriment in its distinction between a 'penalty' and the 'enforcement of a penalty'.

The case affected a killer sentenced to life imprisonment, which was, at the time, the mandatory sentence for murderers in the United Kingdom. Under domestic law, when sentencing an offender of murder, the judge could recommend the minimum period he or she esteems the inmate should serve in prison, but no such minimum recommendation was carried out in the applicant's case. After 13 years in a closed prison, the applicant was transferred to an open prison. In the British legal system, such a transfer is used in cases of faultless performance and is considered to be a step towards release. However, after one year, the applicant was suddenly re-sent 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 this new policy, all offenders should expect to serve a minimum of 20 years in custody. P.H. Hogben's appeal for early release was rejected, and local remedies were exhausted. The applicant introduced an application before the European Commission on Human Rights stating that Articles 3, 5 and 7 had been violated by the respondent state. The applicant complained that the new governmental policy had had the effect of imposing a penalty on him that was harsher than the one originally imposed by the judge at the time of the crime and at the time of his sentencing.

The European Commission on Human Rights dedicated only three short paragraphs to the construction of its legal reasoning on the retrospective application of criminal law. The Commission affirmed that the sentence in the current case had been that of life imprisonment. It also recalled that at the material time the offence of murder clearly established life imprisonment as the penalty associated with this crime. The Commission also acknowledged that the new parole policy made clear that murderers would not be released until they had served at least 20 years. Even if admitting that this new policy had the effect of increasing the length of the imprisonment before the person could be eligible for release, the Commission was of the opinion that this question related to the enforcement of the sentence as opposed to the imposition of a penalty. The penalty was that of life imprisonment and that had never been changed. Accordingly, the Commission stated that it could not be said that the penalty imposed was heavier than what had been imposed by the domestic court.

This decision settled along a very rigid distinction between the penalty imposed and the measures of execution of that penalty. 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. The decision does not develop on the foreseeability of the penalty, but it is clear from its wording that the final argument is that the person was sentenced to life imprisonment and that this had been clear both for the judge and for the convicted. The decision of the Commission disregards any development that may have been applicable in the legal or judiciary practice or in the British customary penitentiary law at the material time to soften the conditions of imprisonment of serious offenders showing good behaviour.

## B *The Kafkaris Case*

A leading case in the ECtHR's case law concerning the application of the principle *nulla poena sine lege* is *Kafkaris v. Cyprus*, which is also a counterpoint to *del Río Prada*. *Kafkaris* was a contract killer who murdered a father and his two sons. On 10 March 1989, he was sentenced to mandatory life imprisonment with respect to each count. The prosecution invited the court to examine the term 'life imprisonment' in the Criminal Code and, in particular, to clarify whether it entailed imprisonment of the convicted person for the rest of his life or just for a period of 20 years, as provided by the Prison Regulations of 1981 and the Prison Amending Regulations of 1987.<sup>26</sup> The domestic court, relying primarily on the findings of a previous judgment of 1988 in *Republic of Cyprus v. Andreas Costa Aristodemou, alias Yiouroukkis*, held that life imprisonment meant imprisonment for the remainder of the life of the convicted person. However, when *Kafkaris* was admitted to prison to serve his sentence, he was given written notice by the prison authorities with a conditional release date (16 July 2002). On the form, under the heading 'sentence', it was marked 'life' and then 'twenty years'. On 9 October 1992 in the case of *Hadjisavvas v. Republic of Cyprus*, the Supreme Court declared the Prison Regulations unconstitutional. In 1996, the Prison Discipline Law was enacted, repealing and replacing the previous Prison Regulations.<sup>27</sup> The part governing the release of prisoners now provides that no prisoner may be discharged from prison until he has served his sentence. The applicant was not released on the date expressed in the written notice given to him by the prison authorities.

The application in the *Kafkaris* case was allocated to the First Section of the ECtHR, which decided to relinquish jurisdiction to the Grand Chamber. The applicant complained that the unforeseeable prolongation of his term of imprisonment as a result of the repeal of the Prison Regulations, as well as the retroactive application of the new legislation, violated Article 7 of the ECHR. The prolongation of his sentence could not have been foreseen either at the time of committing the crime or at the time of his sentencing. He was of the opinion that his sentence had been increased from a definite 20-year term to an indefinite term without prospect of remission. The government pointed out that the Prison Discipline Law, to which the Prison Regulations pertained, simply concerned the manner of the execution of the sentence. It noted that the sentencing court had imposed three consecutive life sentences and that the verdict was clear that imprisonment for life was equal to incarceration for life. The government considered that it could not be said that the repeal of the Regulations had resulted in the retrospective increase of the penalty because the penalty imposed had been that of life imprisonment.

<sup>26</sup> Criminal Code 1962, Law 3/62; Prison (General) Regulations 1981, Regulatory Act 18/81; Prison (General) (Amending) Regulations 1987, Regulatory Act 76/87.

<sup>27</sup> Nicosia Assize Court, *Republic of Cyprus v. Andreas Costa Aristodemou, alias Yiouroukkis*, Case no. 31175/87, Judgment of 5 February 1988; *Hadjisavvas v. Republic of Cyprus*, (1992) 1 AAD 1134. Prison Discipline Law 1996.

The Grand Chamber noted that, at the time the applicant was prosecuted and convicted, the offence of premeditated murder was punishable by mandatory life imprisonment under the Criminal Code. The legal basis for his conviction and sentence was the criminal law applicable at the material time. The essence of the argument concerns the actual meaning of the term ‘life imprisonment’. Although at the time the applicant committed the offence, it was clearly provided by the Criminal Code that the offence of premeditated murder carried with it the penalty of life imprisonment, it is equally clear that at that time the national authorities (both executive and administrative) were working on the premise this penalty was tantamount to 20 years of imprisonment as the prison authorities were applying the Prison Regulations adopted on the basis of the Prison Discipline Law.

While the Court accepted the government’s argument that the purpose of the Prison Regulations concerned the execution of the penalty, it acknowledged that in reality the understanding of the application of these Regulations by national authorities at the material time went far beyond this. However, the Court could neither 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 cannot be said that at the material time the penalty of a life sentence could clearly be taken to amount to 20 years of imprisonment.<sup>28</sup> The argument of the Grand Chamber is that, instead of a question of retrospective imposition of a heavier penalty, the present case is rather about a question of ‘quality of law’. In particular, at the time the applicant committed the offence, the relevant Cypriot law, taken as a whole, was not formulated with sufficient precision.

As a result, the applicant was not able to discern, even with legal advice, to a degree that was reasonable in the circumstances, either the scope of the penalty of life imprisonment or the manner of its execution. Accordingly, the Grand Chamber declared that there had been a violation of Article 7 in this respect.<sup>29</sup> However, concerning the grief that, as a consequence of the change in the Prison Discipline Law, the applicant had a right to have his sentence remitted, the Court was of the opinion that this question related to the execution of the sentence and not to the penalty imposed on him, which remained that of life imprisonment. Although these changes in the prison rules certainly rendered the applicant’s imprisonment harsher, these changes could not be interpreted as imposing a heavier penalty than that decided by the trial court. Given the fact that states are free to determine issues relating to their release policies, there had been no violation of Article 7 in this regard.<sup>30</sup>

In our opinion, despite its search for clarity (the ruling mentions the words ‘clear’ and ‘clarity’ several times along its reasoning), the legal argumentation of the Grand Chamber in *Kafkaris* is not as clear as it should have been. The Spanish judge, Javier Borrego, in his partly dissenting opinion, dared to talk about perplexity. Judges Loucaides and Joçienè talk about confusion. It is true that the facts under scrutiny

<sup>28</sup> *Kafkaris*, *supra* note 2, paras 148, 149.

<sup>29</sup> *Ibid.*, para. 150.

<sup>30</sup> *Ibid.*, para. 151.



were in themselves complex, but the ruling is no less difficult. The Grand Chamber seemed to hesitate and decided to give a Solomonic solution by which it said 'yes, but no'. It found a violation of Article 7 in one respect but not in another. The Court observed in paragraph 149 that 'the Court cannot accept the applicant's argument that a heavier penalty was retroactively imposed on him' and, in paragraph 150, that 'there is no element of retrospective imposition of a heavier penalty involved in the present case', but, nevertheless, it found a violation of Article 7.

This reasoning is quite contradictory. The Court found a violation of the principle *nulla poena sine lege*, which prohibits the retrospective effect of criminal legislation, but, at the same time, it stated that no heavier penalty was retrospectively imposed in the current case. Moreover, the Court does not elaborate at all on the hierarchy of norms in a given legal system (the Criminal Code always having preference over any inferior regulation such as the Prison Regulations). The ECtHR introduced the concept of the 'quality of the law', stating that the problem lay in the weak quality of the domestic law because the Cypriot law 'taken as a whole' was not formulated with sufficient precision. One can doubt whether it is adequate to take the norms of a legal system 'as a whole' instead of analysing which norms have preference over others. In addition, the judgment makes no reference to the date the murders took place, which was 1987, according to the individual opinions of some of the Grand Chamber's judges. The absence of information about the date the crimes took place is especially worrying for a case in which the application of Article 7 is under scrutiny, since the law where retroactivity is at stake has to be confronted with the material time of the commission of the offences.

Despite not finally advocating for the early release of the applicant, the ECtHR in *Kafkaris* paved the way for a more generous interpretation of the term 'penalty' compared to *Hogben*. In *Kafkaris*, the Court took as a basis of its reasoning the decision of the Commission in *Hogben* but partly departed from it. Whereas, in *Hogben*, the Commission gave no credit to the British practice that was being applied at the material time, according to which national authorities acceded to the early release of those offenders sentenced to life imprisonment that were placed in open prisons due to good behaviour, in *Kafkaris*, the ECtHR gave some credit to the Cypriot penitentiary practice, according to which inmates sentenced for serious crimes could expect that they would be released after 20 years of incarceration.

Even by using a confusing line of reasoning, *Kafkaris* condemns a legal system whose criminal and prison rules are so contradictory that it makes it impossible for the individual to ascertain the term of his or her imprisonment. The Prison Regulations, by shortening the maximum time a person could be imprisoned to 20 years, went far beyond the mere execution of a penalty and stretched the concept of penalty itself. Despite the previous finding, the Grand Chamber did not push this line of reasoning further. Instead, it was of the opinion that the penalty of the applicant had been that of life imprisonment, and, therefore, no heavier penalty had been imposed because of the non-remission of his sentence. The reasoning of the Court leaves a bittersweet aftertaste, and the foreseeability test suffers from it. In one respect, the law was not foreseeable because the applicant could not discern the scope of the penalty of life

imprisonment and the manner of its execution. However, from another perspective, the penalty imposed was considered foreseeable, as it had always been that of life imprisonment. With this judgment, the ECtHR certainly offers a rigid interpretation of the term ‘penalty’, to the detriment of the victim, where the applicable law was confusing, without daring, however, to involve itself in national release policies.

### **C A Case about Both Principles Nullum Crimen Sine Lege and Nulla Poena Sine Lege**

*Moiseyev v. Russia* is an espionage case concerning a Russian high-ranking diplomat who sold state secrets to a foreign power.<sup>31</sup> The applicant complained under Article 7 of the ECHR that his conviction had been based on the unforeseeable and retrospective application of the law because at the time when he committed the imputed offences there was no statutory list of state secrets because the new Russian Criminal Code had been applied while not being in force at the material time and because his diplomatic work presupposed in itself an exchange of information with foreign colleagues.<sup>32</sup> He had therefore been unable to foresee that he would incur criminal liability by communicating information that did not constitute a state secret.

The ECtHR did not find a violation of Article 7 of the ECHR on several grounds, some of them dealing with the principle of no crime without law and others with the principle of no penalty without law. On the one hand, the applicant could reasonably have foreseen the crime of espionage at the material time. The Court found some of the constituent elements of the offence of ‘espionage’ in the applicant’s acts. Those elements were sufficient to find the applicant guilty of the offence of high treason in the form of espionage, regardless of whether the offence involved communication of information constituting a state secret. The Court considered that such an interpretation was consistent with the essence of the offence of espionage as defined by Russian law. On the other hand, even if it was true that a new Criminal Code had been enacted and that it was applied to the applicant despite not being in force at the time when the facts took place, this new Criminal Code afforded a maximum of 30 years imprisonment for cases of ‘high treason’, whereas the former Criminal Code established the death penalty for the crime. Article 7 of the ECHR forbids the retroactivity of criminal law, but only if it is against the individual’s benefit (retroactivity *in mitius*).<sup>33</sup>

Thus, the Court found no violation of Article 7 on three grounds. First, the penalty for high treason for espionage under the new Criminal Code was lighter than the one in the former Code; second, the offence of ‘espionage’ was not only limited to the communication of state secrets to foreign agents but also included the collection and communication of ‘other’ non-classified information at the request of a foreign intelligence

<sup>31</sup> ECtHR, *Moiseyev v. Russia*, Appl. no. 62936/00, Judgment of 9 October 2008.

<sup>32</sup> Criminal Code of the Russian Federation, 13 June 1996.

<sup>33</sup> *Moiseyev*, *supra* note 31, paras 240–242. Criminal Code of the Russian Soviet Federative Socialist Republic, 25 February 1927 (as amended on 1 July 1950).

service and, lastly, due to the applicant's diplomatic profile, he should have been aware that providing sensitive information to foreign governments was punishable.

### **D A Case about the Principle of Retrospectiveness of the More Lenient Criminal Law**

The ECtHR has had several opportunities to develop the concept of 'penalty' and of the foreseeability of criminal law. One relevant case is *Scoppola v. Italy*, where the Grand Chamber unanimously said that Italy was to ensure that the sentence of life imprisonment accorded to the applicant was replaced by a penalty consistent with the more lenient principles established in this ECtHR's judgment.<sup>34</sup> The case involved a man who murdered his wife and attacked his son. For his actions, he was liable to life imprisonment but, 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 finally applied – namely, imprisonment for a term of 30 years.<sup>35</sup> On the very same day that Franco Scoppola was convicted, Legislative Decree no. 341 entered into force modifying the Criminal Code in this particular respect and hardening the regime of imprisonment for any convicted person liable of serious cumulative offences.<sup>36</sup> According 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. In view of the new norm, the Assize Court considered that the applicant should have not been subject to 30 years imprisonment but, rather, to life imprisonment with daytime isolation. The Assize Court was of the opinion that the Legislative Decree was a norm of procedure and not of substantive criminal law, as it had only modified the Code of Criminal Procedure, not the Criminal Code. Therefore, it had to be applied to any pending procedure. It also considered that the applicant made his choice by choosing to be judged under the summary procedure and that he could have decided to withdraw his request to be tried under the summary procedure but he had not.

The application was allocated to the Second Section of the ECtHR, but this section decided to relinquish jurisdiction in favour of the Grand Chamber. The latter ruled that criminal norms are not only criminal norms because they are set down in a Criminal Code. Conversely, procedure norms are not only procedure norms because they are established in a code of procedure. The classification made by the domestic law of the norms concerned is not decisive. In this case, the modification of the regime of life imprisonment for cumulative offences provided by the new Legislative Decree should not have been considered as a procedure norm concerning the execution of a penalty only because it affected the Code of Criminal Procedure. The Court had to look beyond what was apparent on the surface and assess whether a given measure amounts in substance to a 'penalty'.<sup>37</sup> In the ongoing case, the norm at stake, which provides that,

<sup>34</sup> ECtHR, *Scoppola v. Italy* (No. 2), Appl. no. 10249/03, Judgment of 17 September 2009.

<sup>35</sup> Code of Criminal Procedure, Law 479, 16 December 1999.

<sup>36</sup> Legislative Decree no. 341, 24 November 2000.

<sup>37</sup> *Scoppola*, *supra* note 34, para. 96.

in the event of conviction, the penalty fixed will be reduced by one-third, cannot be considered as procedure law but, instead, as the penalty imposed following conviction for a criminal offence, and, therefore, it constitutes a penalty, not the enforcement of a penalty. It is clearly a norm introducing new rules on the applicable penalty.

Having said this, the Grand Chamber delved into the controversial question of the foreseeability of the criminal law and the question whether the applicant is to be granted the benefit of a more lenient criminal law. The Court acknowledged that, unlike the United Nations Covenant on Civil and Political Rights, the American Convention on Human Rights or the Charter of Fundamental Rights of the European Union, Article 7 of the ECHR does not grant the right to benefit from a more lenient penalty provided for in a norm subsequent to the commission of the offence.<sup>38</sup> In this area of law, there is a previous decision of the European Commission on Human Rights of 1978 that declared manifestly ill-founded a complaint of an applicant who claimed that he should have been acquitted because the offences at the origin of his conviction had been subsequently decriminalised.<sup>39</sup> However, the ECHR is a living instrument, and the Court should have regard to the conditions in society, especially when there is an emerging consensus on new standards. In this respect, the Grand Chamber has cited the precedent of the Court of Justice of the European Union in the case of *Berlusconi and Others*<sup>40</sup> to maintain that the application of a criminal law providing for a more lenient penalty, even if enacted after the commission of the offence, is a principle that has become fundamental in criminal law. As a result, even if not expressly mentioned in Article 7, the Court has departed from the previous case law and considers that it is consistent with the principle of the rule of law, of which Article 7 is an essential part, to expect a trial court to apply to punishable acts the penalty that is more proportionate. With this judgment, the ECtHR has established that Article 7 grants not only the principle of the non-retroactivity of more stringent criminal norms but also, implicitly, the principle of the retroactivity of the more lenient criminal law. If the criminal law in force at the time of the commission of the offence and the criminal law enacted after the adoption of the verdict are different, the judge will apply the most favourable law for the individual.

With this judgment, the ECtHR pushed forward its own concept of ‘penalty’ as opposed to the ‘enforcement of the penalty’ – a concept that is not dependent on domestic law, is autonomous in scope and whose content is fixed by the Court. However, with this ruling, the ECtHR also deepened its new anti-formalistic and increasingly wide interpretation of the principle of legality, which now includes the benefit of the application of a more lenient criminal law that came into force after the commission of the offence. The consequences of *Scoppola* are relevant. The interpretation of Article 7

<sup>38</sup> International Covenant on Civil and Political Rights 1966, 999 UNTS 171; American Convention on Human Rights 1969, 1144 UNTS 123; Charter of Fundamental Rights of the European Union, Doc. 2012/C 326/02, 26 October 2012.

<sup>39</sup> European Commission on Human Rights, *X. v. Germany*, Appl. no. 7900/77, Judgment of 6 March 1978, paras 70–72.

<sup>40</sup> Case 387/02, 391/02 and 403/02, *Berlusconi and Others*, [2005] ECR I-3565.

given by the Grand Chamber widens the scope of this provision so that from now on it also includes a new principle related to the principle of legality to the individual's benefit, therefore enhancing the protection of human rights.

### ***E The Cases against Germany Concerning the Preventive Detention Regime***

Germany, together with some of the other Council of Europe members, has a Criminal Code, according to which courts responsible for the execution of penalties can place dangerous prisoners who are at risk to reoffend under preventive detention after they have already served their sentence.<sup>41</sup> Under German legislation, this preventive detention is not considered a 'penalty' but, rather, a 'preventive measure' to protect the public. For years, this preventive detention could last a maximum period of 10 years, but, in recent years, an amendment to the German Criminal Code was made that established that this period could become indefinite if the dangerousness of the inmate persisted. There is a saga of cases against Germany concerning the retrospective application of this new preventive detention regime to inmates that were already serving their preventive detention under the old regime.

The first case to be resolved by the Strasbourg Court was the case of *M. v. Germany*.<sup>42</sup> The applicant was a person convicted of very serious repeated assaults, who continued to offend during his confinement. He alleged a breach of Article 5(1) of the ECHR on account of his continued preventive detention beyond the 10-year period, which had been the maximum for such detention under the legal provisions applicable at the time of his offence and conviction. He further claimed that the retrospective extension of his preventive detention to an unlimited period of time had breached his right under Article 7(1) of the ECHR not to have a heavier penalty imposed than the one applicable at the time the crime took place.

Experts found that the applicant suffered from a pathological mental disorder, and he was placed in a psychiatric hospital. But, in 1986, he was convicted and sentenced to five years of imprisonment and was transferred to prison. Since August 1991, the applicant, having served his full prison sentence, has been placed in preventive detention in a different building of the same prison, with access to some privileges. Having regard to the applicant's previous convictions, his conduct in prison, and his lack of empathy, the regional court also ordered the applicant's preventive detention for the period after he would have served 10 years in preventive detention. According to the domestic court, the applicant's continued preventive detention was authorized by Article 67(d) of the Criminal Code, as amended in 1998. In view of the gravity of the applicant's criminal past and possible future offences, his continued preventive detention was not considered disproportionate.

The ECtHR noted that persons subject to preventive detention are to be detained in ordinary prisons, albeit in separate wings with only minor privileges. These minor alterations cannot hide the fact that there is no substantial difference between the

<sup>41</sup> German Criminal Code, 13 November 1998.

<sup>42</sup> *M.*, *supra* note 10.

execution of a prison sentence and that of a preventive detention order. The Court could not subscribe to the government's argument that preventive detention served a purely preventive, and no punitive, purpose. The Court used the findings of both the Council of Europe's commissioner for human rights and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment to insist that persons subject to preventive detention, in view of its potentially indefinite duration, are in particular need of psychological care and support. In view of the indefinite duration of preventive detention, particular endeavours are necessary to give support to these detainees. Furthermore, given its unlimited duration, preventive detention may well be understood by the persons concerned as an additional punishment.

In its judgment, the Court elaborated on the distinction between a measure that constitutes in substance a 'penalty' – to which the absolute ban on retrospective criminal laws applies – and a measure that concerns the 'execution' or 'enforcement' of the 'penalty'. The question to be solved is whether a measure that turns a detention of limited duration into a detention of unlimited duration constitutes in substance an additional penalty or merely concerns the execution of the penalty applicable at the time the applicant was convicted. Preventive detention is ordered by criminal sentencing courts. Moreover, the suspension of preventive detention on probation is subject to a court's finding that there is no danger that the detainee will reoffend, a condition that may be difficult to fulfil. The ECtHR acknowledged that this measure is one of the most severe under the German Criminal Code. The Court concluded that preventive detention under the German law is to be qualified as a 'penalty' for the purposes of Article 7(1) of the ECHR. The Court observed that the sentencing court had ordered the applicant's preventive detention without stating a time limit. At the time the applicant committed his offence, the sentencing court's order for his preventive detention, read in conjunction with Article 67(d) of the Criminal Code in the version then in force, meant that the applicant could be kept in preventive detention for a maximum of 10 years. The prolongation of the applicant's preventive detention by the courts responsible for the execution of sentences following the change in the Criminal Code therefore concerned not just the execution of the penalty but also an additional penalty that was imposed on the applicant retrospectively, under a law enacted after the applicant had committed his offence. Consequently, there had been a violation of Article 7.

The ECtHR explicitly wanted to distinguish this case from that of *Kafkaris*. The Court reminded itself that *Kafkaris* was sentenced to life imprisonment in accordance with the criminal law applicable at the time of his offence. It could not be said that at the material time a life sentence could clearly be taken to amount to 20 years of imprisonment.<sup>43</sup> By contrast, in the present case, the applicable provisions of criminal law at the time the applicant committed his offences unambiguously fixed the duration of the first period of preventive detention at a maximum of 10 years. In *M. v. Germany*, the foreseeability test, as applied by the ECtHR, went in favour of the applicant because, when he was convicted, M. had no chance at all of imagining, or guessing, that the

<sup>43</sup> *Ibid.*, para. 143.

length of the regime of preventive detention would be later increased for unrepentant and dangerous inmates from a fixed term to an indefinite period of time. *M.* is considered a pilot case in the ECtHR's case law since the Court has ever since applied this doctrine to the new cases it has faced concerning the subsequent enlargement of the German regime of preventive detention from a fixed period to an unlimited one.

*Kallweit v. Germany* is a clone case of *M. v. Germany*, similarly showing how the ECtHR's legal reasoning was applied and how the violation of Articles 5 and 7 was at stake.<sup>44</sup> The only difference between the two cases is that in *Kallweit* the Court analysed in a more extensive way why, if the applicant was considered mentally ill, he was placed in a prison rather than in a psychiatric institution. This shows that the true reason of his indefinite internment had a penal nature instead of a therapeutic one. This case gave the ECtHR the opportunity not only to maintain, but also to progressively develop, an enlarged notion of criminal penalty that penalizes legal systems that allow unforeseeable or unpredictable prolongations of the terms of imprisonment.

On the same date that the judgment in *Kallweit* was delivered, the ECtHR also gave its verdict in the case of *Mautes v. Germany*.<sup>45</sup> On 22 July 1991 the regional court sentenced the applicant to six years of imprisonment and ordered his preventive detention under Article 66 of the Criminal Code. The applicant served his full prison sentence. While in prison, he reoffended. He was placed in preventive detention. The ECtHR reached the conclusion that Articles 5 and 7 had been violated. With respect to Article 7, the Court reproduced word for word the twofold legal reasoning that it had used in *Kallweit*. Once again, in *Mautes*, the ECtHR gave its own and autonomous interpretation of the term 'penalty', an interpretation that differed from the one given by the relevant domestic courts. The unforeseeable increase in the imprisonment period as applied by the sentencing German court cannot be considered as an execution of a penalty but, rather, as a new penalty that is in contradiction with the principle of the prohibition of retrospective punishments.

*Jendrowiak v. Germany* is also about a recidivist who had served several sentences for rape.<sup>46</sup> The ECtHR, once again, repeated word for word in its legal reasoning what it had previously said in similar cases. However, it added an argument about the scope of the state authorities' positive obligation to protect potential victims from inhuman or degrading treatment that might be caused by the applicant.

Another case challenging German prison practices is *Schmitz v. Germany*.<sup>47</sup> However, this case differs from *M.*, *Kallweit*, *Mautes* and *Jendrowiak* in that the ECtHR found no violation of Article 5 and also found incompatibility *rationae personae* with Article 7. Therefore, the applicant in *Schmitz's* case was not considered to be a victim. The case is different from *M.* because *Schmitz* was released on probation before the 10 years had expired. He reoffended, and, as a result, the domestic courts condemned him to a new incarceration period, and the first preventive detention period was reordered. He

<sup>44</sup> ECtHR, *Kallweit v. Germany*, Appl. no. 17792/07, Judgment of 13 January 2011.

<sup>45</sup> ECtHR, *Mautes v. Germany*, Appl. no. 20008/07, Judgment of 13 January 2011.

<sup>46</sup> ECtHR, *Jendrowiak v. Germany*, Appl. no. 30060/04, Judgment of 14 April 2011.

<sup>47</sup> ECtHR, *Schmitz v. Germany*, Appl. no. 30493/04, Judgment of 9 June 2011.

appealed against his preventive detention on arguments about its supposed retroactive character. But he did so when he had only accomplished three years of internment after his (second) indictment for preventive detention. The ECtHR, in view of the fact that he had not been placed in indefinite detention and that the German state had given due regard to the pilot judgment in *M.*, declared that there had been no violation of Article 5 and that Paul H. Schmitz had not the character of a victim *ex* Articles 34 and 35 for the effects of the application of Article 7.

*O.H. v. Germany* is another clone case whose pilot judgment is *M. v. Germany*.<sup>48</sup> The legal reasoning of the ECtHR in *O.H.* is very similar to the reasoning employed by the Court in previous cases.

### **F Other Cases Concerning the Principle of Nulla Poena Sine Lege**

There have been other cases before the ECtHR concerning different aspects related to the practical implementation of the principle of *nulla poena sine lege*. *Fruni v. Slovakia* is one of those cases. *Fruni* concerned the alleged extension of the penalty accorded for a specific crime supposedly suffered by an individual whose crimes had been committed before this extension was enacted and in force. In *Fruni*, the applicant alleged the violation of Articles 5, 6 and 7 of the ECHR, but the ECtHR found violation of none of these articles.<sup>49</sup> The applicant was found guilty of an offence of corruption under the old Criminal Code, which allowed for a penalty of imprisonment within the range of five to 12 years. Under the new Criminal Code, the offence in question would allow for a penalty of imprisonment in the range of 10 to 15 years. The applicant was sentenced and jailed for 11-and-a-half years – that is, for a period of time that was within the time limit that both the old and the new Criminal Code attributed to this kind of offence (12 years in the old Code and 15 in the new Code). In these circumstances, the ECtHR discerned no issue under Article 7. It followed that the application was manifestly ill-founded. The case did not raise any questions regarding either the scope of the penalty or its foreseeability because the range of time a person could be imprisoned for this type of crime was clearly established by law – both in the old and the new Criminal Code – and the applicant had been jailed for a period of time that was within the time limit of both Codes. Thus, the resulting punishment could have been easily predicted and foreseen by the offender.

*Alimuçaj v. Albania* is a case that concerned the retrospective application of criminal law in its two aspects of *nullum crimen* and *nulla poena*.<sup>50</sup> It is also a case that dealt with the alleged unforeseeability of the penalty imposed to the individual. This application was about a pyramidal deception. The applicant maintained that the Supreme Court had aggravated his position by imposing a heavier sentence than the one applicable at the time. He also submitted that, since he had engaged in lawful activities in taking loans, he should not have been subjected to criminal prosecution since the activity

<sup>48</sup> ECtHR, *O.H. v. Germany*, Appl. no. 4646/08, Judgment of 24 November 2011.

<sup>49</sup> ECtHR, *Fruni v. Slovakia*, Appl. no. 8014/07, Judgment of 21 June 2011.

<sup>50</sup> ECtHR, *Alimuçaj v. Albania*, Appl. no. 20134/05, Judgment of 7 February 2012.



was of a civil nature. Concerning the question whether the applicant's action constituted a criminal offence, the ECtHR held that the applicant was prosecuted under the Criminal Code, which made the criminal offence of deception punishable. The legal basis for the applicant's prosecution was therefore the criminal law applicable at the material time. The Court noted that the qualification of the applicant's actions as deception did not seem arbitrary and remained within the generally acceptable rules of interpretation of criminal statutes. The Court concluded that there had been no breach of Article 7 under this position.

With respect to the question of whether a heavier penalty was imposed on the applicant than the one that was applicable at the time the offence was committed, the Criminal Code provided that deception carried with it a maximum penalty of five years of imprisonment. This provision did not lay down any aggravating circumstances such as, for example, repeated deception or the organization and operation of fraudulent and pyramidal borrowing schemes. The Supreme Court sentenced the applicant on 57,923 counts of deception (equalling the number of injured parties) to a total of 20 years of imprisonment. The government did not provide any prior, relevant domestic case law to the effect that a person convicted of deception under the Criminal Code could be sentenced on as many counts as the number of injured parties, thereby multiplying the maximum penalty to a term of imprisonment greater than five years. The first clarification made by the domestic courts on this matter was given subsequent to the events on which the applicant's prosecution and conviction were based. The Supreme Court ruled that a person having committed the criminal offence of deception was to be sentenced on as many counts as the number of injured parties.

The ECtHR considered that, at the time the applicant committed the offence, he could not reasonably foresee that he would be found guilty of 57,923 counts of deception, even if he were to seek legal advice. The applicant was neither charged with, nor convicted of, any other criminal offence. He was convicted of 57,923 counts of the same offence. He could not reasonably foresee the imposition of a cumulative sentence for the commission of deception as a repeat offence, in the absence of another accusation and conviction of another charge, even with legal advice. The Court found that there had been a breach of Article 7 since a heavier penalty was imposed on the applicant. It is clear from the ECtHR's verdict that the qualification of the act as deception was foreseeable, and, thus, the principle of *nullum crimen sine lege* was not violated in this respect. However, the foreseeability test as applied by the domestic court fails when faced with the number of counts with which the applicant was convicted. What the applicant could not foresee is that he would be found guilty not for a single crime but, rather, for as many crimes of deception as individuals had lost their money with the applicant's pyramidal operation.

The last case to be reported is *Maktouf and Damjanovic v. Bosnia-Herzegovina*.<sup>51</sup> The applicants were two convicted criminals who challenged the respondent

<sup>51</sup> ECtHR, *Maktouf and Damjanovic v. Bosnia-Herzegovina*, Appl. nos 2312/08 and 34179/08, Judgment of 18 July 2013.

state's decision to apply against them the provisions of the Criminal Code (of 2003), which did not exist at the time they had committed their offences during the Balkan Wars (a time when the former Criminal Code of 1976 was in force). Both of them did not dispute that the acts they had committed constituted criminal offences, and, therefore, the lawfulness of the applicants' convictions was not at issue. However, the problem arises because both Criminal Codes provide for different sentencing frameworks regarding war crimes. Pursuant to the 1976 Code, war crimes are punishable by imprisonment for a term of five to 15 years or, for the more serious cases, by the death penalty. A 20-year prison term could also be imposed instead of the death penalty. Collaborators of war crimes, like the first applicant, are to be punished as the authors of their crime, but their punishment could be reduced to one year of imprisonment. Pursuant to the 2003 Code, war crimes imply imprisonment for 10 to 20 years or, for the most serious cases, 20 to 45 years. Collaborators of war crimes, like the first applicant, are to be punished as the authors of their crime, but their punishment could be reduced to five years of imprisonment. The first applicant was convicted for five years and the second for 11 years.

The government argued that it had applied the 2003 Criminal Code because it was more lenient, given the absence of the death penalty. Moreover, the first applicant had received the lowest sentence available for those crimes in the current Code and the second applicant a sentence that was slightly above the lowest level set by the 2003 Code. In addition, the applicants' sentences were within the limits of both the 1976 and 2003 Criminal Codes. The government also provided the opinion that if the act falls within the realm of Article 7(2) (general principles of law recognized by civilized nations) the non-retroactivity principle does not apply.

The Grand Chamber found a violation of Article 7 in that the applicants could have received lower sentences had the 1976 Code been applied. In the first applicant's case, and being that he was a collaborator, his sentence could have been lower than five years. In fact, he could have been sentenced to only one year of imprisonment. In the case of the second applicant, his sentence could have been lowered to five years instead of 11. Moreover, the death penalty would have never been applied since their crimes did not concern murder. The Court could not accept the state's argument that if an act is criminal under the general principles of law recognized by civilized nations within the meaning of Article 7(2) the rule of non-retroactivity does not apply. This interpretation is inconsistent with the preparatory works of Article 7(2), whose only purpose was to facilitate the prosecution of World War II criminals and only in connection with crimes committed during that war. Somehow, the Court acknowledged the obsolescence of Article 7(2), as the prosecution of war crimes is now included in the Criminal Codes of all of the Council of Europe's member states. The final conclusion was that, while, in principle, states are free to decide about their own penal policy, in so doing they must comply with the requirements of Article 7. Consequently, the ECtHR found unanimously a violation of Article 7.

## 4 *Del Río Prada*: Facts under Scrutiny and the Legal Reasoning of the ECtHR

### A *The Origin of the Case*

For more than 40 years, starting during the dictatorship and continuing through decades of the democratic regime, Spain suffered the attacks of the Euskadi Ta Askatasuna (ETA), a terrorist group whose aim was the independence of a Spanish region by means of violence.<sup>52</sup> The balance of this blameful activity was the assassination of almost 1,000 innocent victims. Some members of the ETA are guilty of dozens of murders. Among them, special mention should be made of Inés del Río Prada, an unrepentant terrorist guilty of at least 25 assassinations. Del Río was arrested and judged in eight separate sets of criminal proceedings before the Audiencia Nacional. Under the 1973 Criminal Code, she was found guilty of a large number of crimes.<sup>53</sup> In all, the terms of imprisonment to which the applicant was sentenced for these offences amounted to over 3,000 years. In Spain, the maximum prison sentence is 30 years.<sup>54</sup> Thus, the Audiencia Nacional set the maximum term to be served by the applicant with respect to all of her prison sentences combined to thirty years. The Audiencia Nacional set the date on which the applicant would have fully discharged her sentence (*liquidación de condena*) as 27 June 2017.

In Spain, until the reform of the 1995 Criminal Code, the Penitentiary Law allowed for remissions of sentences to be applied to the maximum prison duration.<sup>55</sup> On 24 April 2008, taking into account the 3,282 days of remission to which she was entitled for the work she had done since 1987, the authorities at Murcia Prison, where the applicant was serving her sentence, proposed to the Audiencia Nacional a release date of 2 July 2008. Documents submitted to the Court by the government show that the applicant was granted ordinary and extraordinary remissions of sentences by virtue of the decisions of the judges responsible for the execution of sentences. The remissions were granted for cleaning the prison, her cell and the communal areas as well as for undertaking university studies.

The 1995 reform of the Criminal Code abolished the remission of sentences for work carried out in prison. However, it also contained transitional provisions predicated on

<sup>52</sup> About *del Río Prada* case, *supra* note 1, see Farré Díaz, 'A propósito de la sentencia del Tribunal europeo de derechos humanos en el caso del río Prada versus España, de 21 de octubre de 2013. Doctrina "Parot"', 5 *Revista Aranzadi Doctrinal* (2013) 121; Rodríguez Montañés, 'Doctrina Parot: Claves para entender las sentencias del TEDH en el caso del Río Prada c. España', 6 *Economía* (2014) 137; Alcacer Guirao, 'La "doctrina Parot" ante Estrasburgo: *Del Río Prada c. España* (STEDH 10.7.2012, n. 42750/09). Consideraciones sobre la aplicación retroactiva de la jurisprudencia y la ejecución de las sentencias del TEDH', 43 *Revista de Derecho Comunitario Europeo* (2012) 929; Landa Gorostiza, 'Ejecución de penas y principio de legalidad ante el TEDH: A propósito del caso del Río Prada c. España, STEDH, 3ª, 10.07.2012 (42750/09) y la aplicación de la doctrina Parot', 4 *Indret: Revista para el Análisis del Derecho* (2012), available at [www.indret.com/pdf/924.pdf](http://www.indret.com/pdf/924.pdf).

<sup>53</sup> Criminal Code, Decree 3096/1973, 14 September 1973.

<sup>54</sup> In July 2015, the new reform of the Criminal Code changed this framework with the introduction within the Spanish criminal system of the penalty of revisable permanent imprisonment.

<sup>55</sup> Criminal Code, Organic Law 10/1995, 25 November 1995.

the most lenient law for individuals already convicted under the 1973 Criminal Code. Thus, although this reform did away with remissions for work done in detention for people that would be convicted in the future, it allowed prisoners convicted under the old 1973 Code to continue to benefit from the sentence's adjustments (benefits) to their advantage.

Subsequent to her internment, the Supreme Court ruled that remissions of sentences were no longer to be applied to the maximum term of imprisonment of 30 years but, rather, to each of the sentences successively. Consequently, on 19 May 2008, the Audiencia Nacional rejected the Murcia Prison's proposal and asked the prison authorities to submit a new date for the applicant's release, based on this new precedent (known as the '*Parot doctrine*') set by the Supreme Court in Judgment no. 197/2006 of 28 February 2006.<sup>56</sup> The case concerned a member of the ETA (Henri Parot) who had been convicted under the 1973 Criminal Code. The plenary Criminal Division of the Supreme Court ruled that the remissions of sentences granted to prisoners were henceforth to be applied to each of the sentences imposed and not to the maximum term of 30 years provided for in the 1973 Criminal Code. The Supreme's Court's ruling was based, in particular, on a literal interpretation of Articles 70(2) and 100 of the 1973 Criminal Code, according to which the maximum term of imprisonment was not to be treated as a new sentence distinct from those imposed but, rather, as the maximum term a convicted person should spend in prison. This reasoning made a distinction between the 'sentence' (*pena*) and the 'term to be served' (*condena*); the former referred to the sentences imposed taken individually and to which remissions of sentences should be applied, while the latter referred to the maximum term of imprisonment to be served. According to this new approach, sentence adjustments (*beneficios*) and remissions were no longer to be applied to the maximum term of imprisonment of 30 years but successively to each of the sentences imposed.

In the Supreme Court's opinion, even assuming that its new interpretation of Article 70 of the 1973 Criminal Code could be regarded as a departure from its case law and from previous prison practice, the principle of equality before the law established in Article 14 of the Constitution did not preclude departures from the case law, provided that sufficient reasons were given. Furthermore, the principle that criminal law should not be applied retroactively (Articles 9 and 25 of the Constitution) was not meant to apply to the case law. The Audiencia Nacional explained that this new approach applied only to people convicted under the 1973 Criminal Code. Since this was case with the applicant, the date of del Río Prada's release was to be changed accordingly. The Audiencia set the date for the applicant's final release at 27 June 2017. The applicant lodged an *amparo* appeal to the Constitutional Court. She argued, *inter alia*, that the application of the Supreme Court's judgment was in breach of the principle of non-retroactive application of criminal law provisions less favourable to the accused because, instead of being applied to the maximum term to be served, remissions of sentences were henceforth to be applied to each of the sentences

<sup>56</sup> Supreme Court, *P. Henri Parot Navarro*, Cassation case no. 598/2005, Judgment of 28 February 2006.

imposed. The effect, she argued, would be to increase the term of imprisonment she actually served by almost nine years. In a decision made on 17 February 2009, the Constitutional Court declared the appeal inadmissible on the grounds that the applicant had not demonstrated the constitutional relevance of her complaints. In similar cases, the Constitutional Court had rejected the applicants' complaints on the basis that the remission of sentences concerned the execution of a penalty (term to be served), not the penalty itself (*poena*) and that the penalty had not been harsher than what had been imposed at the time the offences were tried.

### B The Chamber's Judgment

After having exhausted local remedies, del Río lodged an application before the ECtHR. The applicant alleged that what she considered to be the retroactive application of a departure from the case law by the Supreme Court after she had been convicted had extended her detention by almost nine years, in violation of Article 7 of the ECHR. In its judgment of 10 July 2012, the Chamber found that there had been a violation of Article 7. It reached this finding after having noted, first of all, that although the provisions of the 1973 Criminal Code applicable to remissions of sentences and the maximum term of imprisonment a person could serve – namely, 30 years under Article 70 of that Code – were somewhat ambiguous, the prison authorities and the Spanish courts, in practice, tended to treat the maximum legal term of imprisonment as a new, independent sentence to which adjustments such as the remission of a sentence for work carried out in detention should be applied. It concluded that, at the time when the offences had been committed and at the time when the decision to combine the sentences had been adopted (30 November 2000), the relevant Spanish law taken as a whole, including the case law, had been formulated with sufficient precision as to enable the applicant to discern the scope of the penalty imposed and the manner of its execution.<sup>57</sup>

Second, the Chamber observed that, in the applicant's case, the new interpretation given by the Supreme Court in 2006 on the way in which remissions of sentences should be applied had led, retroactively, to the extension of the applicant's term of imprisonment by almost nine years, depriving her of the remissions of sentences for work and studies carried out in detention to which she would otherwise have been entitled. That being so, it considered that this measure not only concerned the execution of the applicant's sentence but also had a decisive impact on the scope of the 'penalty' for the purposes of Article 7.<sup>58</sup>

Third, the Chamber noted that the Supreme Court's change of approach had no basis in the case law and that the government had acknowledged that the previous practice of the prisons and the courts would have been more favourable to the applicant. It pointed out that the departure from previous practice had come about after the entry into force of the new 1995 Criminal Code, which abrogated the remission

<sup>57</sup> *Del Río Prada*, *supra* note 1, para. 55, with a reference, by contrast, to *Kafkaris*, *supra* note 2, para. 150.

<sup>58</sup> *Del Río Prada*, *supra* note 1, para. 59.

of a sentence for work done in detention and established new – stricter – rules on the application of sentence adjustments to prisoners sentenced to several lengthy terms of imprisonment. It emphasized that the domestic courts must not, retroactively and to the detriment of the individual concerned, apply the criminal policy that had lain behind the legislative changes that were brought in after the offence was committed.<sup>59</sup> It had been difficult, or even impossible, for the applicant to imagine, at the material time and also at the time when all of the sentences were combined and a maximum term of imprisonment fixed, that in 2006 the Supreme Court would depart from its previous case law and would change the way remissions of sentences were applied, that this departure from the case law would be applied to her case and that the duration of her incarceration would be substantially lengthened as a result.<sup>60</sup> Unsatisfied with this result, the ECtHR received a request from the Spanish government on 4 October 2012 for the case to be referred to the Grand Chamber.

### C *The Grand Chamber's Judgment*

The Grand Chamber considered the case law and practice regarding the interpretation of the relevant provisions of the 1973 Criminal Code. It noted that, prior to the Supreme Court's Judgment no. 197/2006, when a person was given several prison sentences and a decision was taken to combine them and fix a maximum term to be served, the prison authorities and the Spanish courts had applied the remissions of sentences to the maximum term to be served under Article 70(2) of the 1973 Criminal Code. The prison and judicial authorities thus took into account the maximum legal term of 30 years of imprisonment when applying the remission of a sentence for work done in detention. Until the Supreme Court's Judgment no. 197/2006, this approach was applied to numerous prisoners convicted under the 1973 Criminal Code whose remissions for work carried out in detention were deducted regularly from the maximum term of 30 years of imprisonment.

Like the Chamber, the Grand Chamber considered that in spite of the ambiguity of the relevant provisions of the 1973 Criminal Code, it was clearly the practice of the Spanish prison and the judicial authorities to treat the term of imprisonment to be served (*condena*) – that is to say, the 30-year maximum term of imprisonment provided for in Article 70(2) of the 1973 Criminal Code – as a new, independent sentence to which certain adjustments, such as the remissions of sentences, should be applied. That being so, while the applicant was serving her prison sentence, she was entitled to expect that the penalty imposed was the 30-year maximum term, from which any remission of a sentence would be deducted.

The Grand Chamber further noted that the remissions of sentences for work done while in detention were expressly provided for by statutory law (Article 100 of the 1973 Criminal Code) and not by the regulations. Moreover, it was in the same Code that the sentences were prescribed and the remissions of sentences provided for. After

<sup>59</sup> *Ibid.*, para. 62.

<sup>60</sup> *Ibid.*, para. 63.

the deduction of the remissions of sentences for work carried out while in detention, which were periodically approved by the judge responsible for the execution of sentences (*juez de vigilancia penitenciaria*), the sentence was fully and finally discharged on the date of release approved by the sentencing court. The new method of calculation amounted to the retroactive imposition of a new penalty. The applicant had the legitimate expectation that the reduction of the sentence to which she was entitled would apply to the maximum time a person could be lawfully jailed in Spain.

The Court noted that the application of the '*Parot doctrine*' to the applicant's situation deprived of any useful effect the remission of sentences in accordance with the final decision of the judges responsible for the execution of sentences. The Grand Chamber considered that the recourse in the present case to this new approach to the application of the remission of sentences introduced by the '*Parot doctrine*' could not be regarded as a measure relating solely to the execution of the penalty imposed on the applicant, as the government had argued. This measure taken by the Supreme Court led to the redefinition of the scope of the 'penalty' imposed. As a result of the '*Parot doctrine*', the maximum term of 30 years of imprisonment ceased to be an independent sentence to which remissions of sentences for work carried out while in detention were applied and, instead, became a 30-year sentence to which no such remissions would effectively be applied.

The Grand Chamber did not accept the argument that the Supreme Court's interpretation in *Parot* was foreseeable because it was more in keeping with the letter of the 1973 Criminal Code. The Court's task was not to determine how the provisions of that Code should be interpreted in the domestic law but, rather, to examine whether the new interpretation was reasonably foreseeable for the applicant under the 'law' applicable at the material time. This 'law' – in the substantive sense in which the term is used in the Convention, which includes unwritten law and case law – had been applied consistently by the prison and judicial authorities for many years until the '*Parot doctrine*' set a new path.

Lastly, criminal policy considerations relied on by the Supreme Court cannot suffice to justify such a departure from the previous case law. While the Court accepted that the Supreme Court did not retroactively apply Law no. 7/2003 amending the 1995 Criminal Code, it is clear from the reasoning given by the Supreme Court that its aim was the same as that of the above-mentioned law, namely to guarantee the full execution of the maximum legal term of imprisonment by people serving several long sentences. In this connection, while the Court accepted that the states are free to determine their own criminal policy – for example, by increasing the penalties applicable to criminal offences – they must comply with the requirements of Article 7 in doing so.<sup>61</sup> On this point, the Court reiterated that Article 7 unconditionally prohibits the retrospective application of the criminal law where it is to a defendant's disadvantage.

In light of the foregoing, the Grand Chamber considered that, at the time when the applicant was convicted and at the time when she was notified of the decision to combine her sentences and to set a maximum term of imprisonment, there was no

<sup>61</sup> *Maktouf and Damjanović*, *supra* note 51, para. 75.

indication of any line of case law development in keeping with the Supreme Court's judgment of 28 February 2006. The applicant therefore had no way of knowing that the Supreme Court would be changing its previous case law and that the Audiencia Nacional, as a result, would deduct the remissions of sentences granted to her successively to each of the sentences she had received. As the ECtHR noted, this departure from the case law had the effect of modifying the scope of the penalty imposed to the applicant's detriment. It followed that there had been a violation of Article 7.

#### D Interpretation

Do the ends justify the means in the Spanish criminal system? It is legitimate to ask this question in view of the judicial proceedings that kept del Río Prada in prison longer than prescribed in her conviction. Del Río Prada committed numerous crimes that she never regretted. But the terms of her imprisonment were clear at the time of her conviction. However, a subsequent change in the Criminal Code and the delivery – six years after her conviction – of a ruling by the Supreme Court establishing a new policy for the remission of sentences had the effect of retrospectively modifying the scope of the penalty imposed, to the applicant's detriment.

The Spanish criminal system did not comprise at the material time a measure such as preventive detention. As seen in the pilot case of *M. v. Germany*, under the legislation of several European states, reoffenders can be placed under a preventive detention regime after they have served their sentence if they are still considered dangerous, if they are at risk of reoffending and if they manifest a total lack of empathy towards their victims. However, this was not the case in Spain at that moment. At the relevant time, after having served their sentences, prisoners have to be released regardless of the harm they have caused or the dangerousness of their personality and attitude. Spain cannot be expected to produce the effect of a preventive detention regime through the retrospective and illegal enlargement of a sentence that has the effect of depriving the convicted person of any real prospect of benefitting from the remission of a sentence to which she was entitled in accordance with the law.

This change in the system for applying the remission of a sentence can only apply to subsequent crimes, not to crimes that occurred before the delivery of the Supreme Court's judgment. The application of this new doctrine to del Río Prada had the effect of imposing on her a further or additional 'penalty' over and above the 'penalty' that was applicable at the time when she had committed her offences. The reasoning of the Grand Chamber in this case is innovative in that it combines both formal and substantive criteria to expand the scope of the concept of 'penalty'. Building on its own previous case law, starting with *Kafkaris* and continuing with *Scoppola* and the cases against Germany's preventive detention regime, *del Río Prada* consolidates the ECtHR's doctrine that blurs the dividing line between the measures that amount to a penalty and the measures that relate to the enforcement of that penalty. Neither the classification by national law of a measure as being the execution of a penalty, nor the unquestionable right of a state to depart from its previous jurisprudence, allows for



the retrospective application of a measure to the individual's detriment that amounts to the prolongation of his or her imprisonment beyond the terms settled at the time he or she offended and was judged.

The Grand Chamber understands that the law in force is a concept comprising both statute law and case law. Likewise, the term 'law' is 'substantive' in nature, not formal. It includes both legislative and judicial measures. In short, the 'law' is the provision in force as the competent courts have interpreted. In this respect, the Grand Chamber does not discuss the right of the state to change through a judicial amendment in the same way it calculates the remissions of sentences. However, in our opinion and given the characteristics of the Spanish legal system, which gives preference to written law and does not consider case law as a source of law, such a relevant change in the applicable criminal law should not be done judicially but, rather, through a formal reform of the Criminal Code. According to the ECtHR, since the case law is also part of the applicable domestic law, states are free to change the system for applying the remission of sentences through judicial developments as opposed to a change in the legislation. However, what a state cannot do if it is to comply with the requirements of the ECHR is to apply these new judicial developments to individuals already serving their sentence when these new developments have the effect of increasing the time they will serve in prison.

The critical question here is whether the rule changing the method of calculating the remission of sentences could be knowable to *del Río Prada*. From an utilitarian standpoint, people can be deterred from a crime if they can calculate the consequences of their actions.<sup>62</sup> Or, in the present case, an inmate could disregard any measures aimed at the remission of sentences if he or she could calculate that they would not have the effect of reducing the time in prison. In *del Río Prada*, the foreseeability test does not concern the question whether the offender knew, or could have known, that her actions were punishable. The question is whether she could have foreseen at the material time that the remissions of sentences would subsequently lose their value in Spain due to a change of policy decided while she was already serving her sentence. The foreseeability test may include two aspects: the objective one (the existence of the legal norm in itself) and the subjective awareness of both its existence and its applicability.<sup>63</sup> In *del Río Prada*, both the objective change of the norm as well as the ability of the applicant to foresee the change in the applicable norm could not have been reasonably foreseen because the norm had been applied in its original form for decades, and it was an unexpected judicial ruling with a supposed retroactive character that suddenly changed this situation.

In *del Río Prada*, the Spanish Supreme Court did what even the law does not allow you to do – namely, to apply retrospectively a rule related to the conviction of a person

<sup>62</sup> Van der Wilt, 'Nullum crimen and the relevance of the foreseeability test', 84(3) *Nordic Journal of International Law (NJIL)* (2015) 515, at 526. *Vide* also but only for international crimes committed in the past. Mariniello, 'The Nuremberg Clause and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence', 82(2) *NJIL* (2013) 221.

<sup>63</sup> Van der Wilt, *supra* note 62, at 529.

that affects adversely the period he or she will be in prison. This change of criteria was not one of the possible interpretations of the domestic law in force at the time the offences were committed. It did not comply with the requirements of the foreseeability test. In the Supreme Court's overruling, there is implicitly a hidden retroactivity that could not have been rationally foreseen by the applicant and could never have been anticipated by the individual.<sup>64</sup>

## 5 *Kafkaris* and *del Río Prada*: Symmetries and Asymmetries

In both *Kafkaris* and *del Río Prada*, the ECtHR is confronted with legal systems that allowed for the remission of sentences. At the time the applicants committed their offences, the Cypriot 1981 Prison Regulations provided that the remission of the sentence of life imprisonment had to be calculated as if the imprisonment was for 20 years, and the 1973 Spanish Criminal Code established that the maximum time to be served in prison should not exceed 30 years, to which the remission of sentences applied, respectively. However, one of the main difference between both cases has to do with the rank of the norm that allows for the remission of sentences. In Cyprus, it is a regulation (the Prison Regulations), whereas, in Spain, it is the Criminal Code in force itself – that is, statutory law. Moreover, it was in the same Code that the sentences were prescribed and the remissions of sentences were provided for. In this respect, in the Spanish case, the applicant was entitled to believe that her release would be after 30 years of imprisonment (if not earlier, due to good conduct and studies), whereas, in the Cypriot case, the applicant was in a more confusing situation. In *Kafkaris* the applicant could not be certain of early release as there was an inconsistency between the Criminal Code and the judgment of the sentencing court, which convicted the applicant and imposed on him a clear sentence of imprisonment for the remainder of his life, on the one hand, and the Prison Regulations and the written notice given to him by prison authorities, which provided for an early release after 20 years of imprisonment, on the other. At the time when the offences were committed, the relevant Spanish law, taken as a whole, including the case law, had been formulated with sufficient precision to enable the applicant to discern in a clear way the scope of the penalty imposed and the manner of its execution, something that could not be said, by contrast, of the Cypriot law. However, it could be added that in case of discrepancy between two contemporary norms, the most favourable norm should apply.

An aspect in which both cases coincide concerns the lack of clarity about the dates of the facts under scrutiny, as explained by the judgments. With the information provided, both in *Kafkaris* and *del Río Prada*, it is impossible to ascertain the exact days on which the crimes took place. The information is only accurate with respect to the dates of the applicants' convictions by the sentencing courts. The question is not

<sup>64</sup> Cuerda Arnau, 'Cambios jurisprudenciales y retroactividad desfavorable (A propósito de la STEDH Del Río Prada c. España)', 31 *Revista Penal* (2013) 52, at 65.

trivial because the basic objective of Article 7 is to prohibit the retrospective application of criminal law, and the most important data for checking this is precisely the date of the commission of the offences. In *del Río Prada*, due to the applicant's date of birth, one has to presume that the Code in force at the material time was the 1973 Criminal Code. This is confirmed by the government's mention of 1982 as the year the applicant was discovered to be a member of the ETA and by the Court's statement that the crimes were committed between 1982 and 1987.<sup>65</sup> In *Kafkaris*, it is the individual opinion of Judge Borrego that is helpful in letting us know that the murders took place in July 1987. If that is the case, the applicable law in *Kafkaris* is the 1962 Criminal Code, which was amended by two laws, one in 1981 and the other in 1986.

The two judgments coincide in that in both it was a national judgment, delivered in an unrelated case, that is used by the respective governments to change the regime of the remission of sentences in both countries and to increase *in malam partem* the period the applicants will be held in prison – namely, *Republic of Cyprus v. Andreas Costa Aristodemou, alias Yiouroukkis* and the *Parot* case, respectively. However, there is a difference between the two domestic judgments and the situation that those judgments were able to provoke in the situations of *Kafkaris* and *del Río Prada*, respectively. The emission of the judgment in *Yiouroukkis* took place in 1988 – that is, before the emission of the *Kafkaris* sentence by the national court in 1989 (but also after the commission of the murders in 1987), whereas the delivery of the *Parot* sentence by the Spanish Supreme Court was in 2006, long after *del Río Prada*'s last conviction, which was in 2000. In *del Río Prada*, it is crystal clear that the delivery of a posterior judicial ruling that changes the way in which remissions of sentences are calculated should never prejudice inmates already serving their sentence. But, in our opinion, neither should the delivery of a ruling that worsens the domestic system of the remission of sentences to the individual's detriment be applied to a person who offended before the delivery of that judgment but had not yet been convicted, as happens in *Kafkaris*. Both in *Kafkaris* and *del Río Prada*, the state authorities are wrong to apply these national precedents, which worsen the system of the remission of sentences, to the applicants. In so doing, the authorities are giving these precedents a retrospective effect by applying them to crimes committed prior to the change of jurisprudence. In the case of *Pessino v. France*, the ECtHR already stated that a criminal sanction based on an unpredictable change of jurisprudence is contrary to Article 7.<sup>66</sup>

Both the Commission and the Court in their case law 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'. Where the nature and purpose of a measure relate to the remission of a sentence or to a change in a regime for early release, it does not form part of the 'penalty' within the meaning of Article 7. However, this distinction is not always clearcut. It can even be very ambiguous. In *Kafkaris*, the Court considered that the changes were related to the execution of the

<sup>65</sup> *Del Río Prada*, *supra* note 1, paras 12, 67.

<sup>66</sup> ECtHR, *Pessino v. France*, Appl. no. 40403/02, Judgment of 10 October 2006.

sentence as opposed to the penalty imposed, which remained that of life imprisonment. The Grand Chamber explained that, although the changes in the prison legislation and in the conditions of release might have rendered the applicant's imprisonment harsher, these changes could not be understood as imposing a heavier 'penalty' than that imposed by the trial court. It reiterated in this connection that issues relating to release policies, the manner of their implementation and the reasoning behind them fell within the power of the state to determine its own criminal regime.<sup>67</sup>

However, as the ECtHR itself has acknowledged, in practice the distinction between a measure that constitutes a 'penalty' and a measure that concerns the 'execution' or 'enforcement' of the 'penalty' is not always self-evident.<sup>68</sup> In *Kafkaris*, the Court accepted that the manner in which the Prison Regulations concerning the execution of sentences had been understood and applied with respect to the life sentence the applicant was serving went beyond the mere execution of the sentence. Whereas the trial court had sentenced the applicant to imprisonment for life, the Prison Regulations explained that what that actually meant was 20 years of imprisonment, to which the prison authorities might apply any remissions of the sentence. The Court considered that 'the distinction between the scope of a life sentence and the manner of its execution was therefore not immediately apparent'.<sup>69</sup>

In the *del Río Prada* ruling, the Grand Chamber reached a similar conclusion in regard to the question of the execution of a penalty. The Court noted that the application of the 'Parot doctrine' to the applicant's situation deprived of any effect the remissions of sentences to which she was entitled. It is significant that the government had been unable to specify whether the remissions of sentences granted to the applicant for work done in detention had any effect at all on the duration of her incarceration. That being so, although the Court agreed with the government that arrangements for granting adjustments of the sentence as such fell outside the scope of Article 7, it considered that the way in which the provisions of the 1973 Criminal Code were applied to the present case went beyond mere prison policy. The recourse in the present case to the new approach concerning remissions of sentences introduced by the 'Parot doctrine' has to be regarded as substantive criminal law – that is, a provision affecting the actual fixing of the sentence and not just its execution. This measure taken by the court that convicted the applicant led to the redefinition of the scope of the 'penalty' imposed.

In short, both in *Kafkaris* and in *del Río Prada*, the Court went beyond what the respondent states had maintained. Both Cyprus and Spain had made allegations about these cases falling outside the protection of Article 7 because, in their opinion, they related to the adjustment of sentences and not to the penalty itself. In both, the Court reached the conclusion that the way the law was applied could not be regarded as a mere execution of a penalty. The distinction between the scope of the penalty and

<sup>67</sup> *Kafkaris*, *supra* note 2, para. 151.

<sup>68</sup> See *Ibid.*, para. 142; ECtHR, *Gurguchiani v. Spain*, Appl. no. 16012/06, Judgment of 15 December 2009, para. 31; *M.*, *supra* note 10, para. 121.

<sup>69</sup> *Kafkaris*, *supra* note 2, para. 148.

the manner of its execution amounted to an interpretation of the law *in malam partem* to the detriment of the convicted person.

A last but crucial difference between the two rulings concerns the execution of the ECtHR judgments themselves. The ECtHR judgments are declarative in nature.<sup>70</sup> They declare a violation but not its consequences. Article 41 of the ECHR provides for just satisfaction in cases where the condemned state is not in a position to allow for the complete reparation.<sup>71</sup> In the past, the ECtHR judgments only stated whether there had been a violation of the ECHR. Sometimes they also included a just satisfaction in the form of a monetary compensation. The translation of a violation of rights into an economic sum for the victim's benefit is often a very narrow way of protecting rights. This is one of the reasons why the Court has started recently to indicate the measures that better repair victims' rights. This new trend of the Court also tries to facilitate states in their process of execution of the judgment. In principle, the state is free to choose the means by which it will discharge its legal obligation under Article 46 of the ECHR, provided that such means are compatible with the conclusions of the Court's judgment.<sup>72</sup>

However, in certain situations, with a view to assisting the respondent state in fulfilling its obligations, the Court has indicated the type of measures that might be taken in order to put an end to the situation that gave rise to the finding of a violation.<sup>73</sup> In exceptional cases, the nature of the violation may be such as to leave no real choice as to the measures required to remedy it, and the Court may decide to indicate only one such measure.<sup>74</sup> In this aspect, *Kafkaris* and *del Río Prada* differ. In the former, the applicant did not seek compensation for pecuniary damage. He submitted that a finding of a violation in respect of his complaints and his consequent release from prison would constitute adequate satisfaction.<sup>75</sup> The Court 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. This *lacuna* of the judgment is deceiving because the Court found a violation, although partial, of Article 7, and it is clear from the case that the only way to satisfy the applicant's claim is through his early release.

Conversely in *del Río Prada*, the ECtHR considered that the application belonged to a category of cases that, because of its nature, left no real choice as to the measures required to remedy. This is why the Court decided to indicate one such measure. Having

<sup>70</sup> Art. 46 ECHR: '1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.'

<sup>71</sup> Art. 41 ECHR: 'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

<sup>72</sup> See ECtHR, *Scozzari and Giunta v. Italy*, Appl. no. 39221/98 and 41963/98, Judgment of 13 July 2000, para. 249.

<sup>73</sup> ECtHR, *Broniowski v. Poland*, Appl. no. 31443/96, Judgment of 22 June 2004, para. 194.

<sup>74</sup> ECtHR, *Assanidze v. Georgia*, Appl. no. 71503/01, Judgment of 8 April 2004, paras 202–203; ECtHR, *Fatullayev v. Azerbaijan*, Appl. no. 40984/07, Judgment of 22 April 2010, paras 176–177.

<sup>75</sup> *Kafkaris*, *supra* note 2, para. 168.

regard to the particular circumstances of the case and to the urgent need to put an end to the violations of the Convention it had found, the Grand Chamber, by 16 votes to one, considered it incumbent on the respondent state to ensure that the applicant was released at the earliest possible date.<sup>76</sup> The Court was aware of the change of criteria compared to its previous doctrine in *Kafkaris*. This is why it tried to justify the difference of treatment that *Kafkaris* and *del Río Prada* deserve by stating that in *del Río Prada* it also found a violation of Article 5, something that was missing in *Kafkaris*. However, this reasoning sounds more like an excuse. The fact is that two individuals in very similar situations did not receive the same treatment by the ECtHR in regard to the guarantee of their release.<sup>77</sup>

## 6 Conclusions

Article 7 of the ECHR has not been invoked by applicants very often before the Strasbourg Court. Some have said that this provision represents the ECHR's hidden jewel.<sup>78</sup> Some recent cases such as *Kafkaris* and *del Río Prada* have changed this situation and have placed it at the centre of the legal debate. No one can deny the fantastic media coverage of these two cases that involved dangerous inmates convicted of cold-blooded murders of children and adults, one for money and the other for terrorism. The impact on Cypriot and Spanish societies when they learned that these two murderers were asking the ECtHR for their early release should not be ignored. But the question is whether the ends justify the means. Is it legitimate for state authorities to change their release policies so as to keep convicted prisoners in prison for longer?

*Kafkaris* shows the situation of a confusing legal system in which two contemporary norms with different rank gave a different period of incarceration for the same crimes and where a judgment of a national court in a different case – issued after the commission of the crimes but before the applicant's conviction – was used to keep the individual in prison. *Del Río Prada* shows a legal system in which a judgment of a national higher court – issued long after the commission of the applicant's crimes and long after her conviction – was used to keep her in prison despite what the Criminal Code in force at the material time said. Thus, the value of the national judgments is at issue in both cases. The ECtHR does not deny that jurisprudence is part of the law. It is a concept comprising both statute law and case law and both written and unwritten norms. Although it includes judicial measures, the principles of the legality of sanctions, of legal security and of proportionality forbid the application of a posterior judicial ruling to facts that

<sup>76</sup> *Del Río Prada*, *supra* note 1, para. 139.

<sup>77</sup> In *Scoppola*, *supra* note 34, which was judged a year after the Grand Chamber had judged *Kafkaris*, *supra* note 2, the Grand Chamber not only held that there had been a violation of Article 7, but it also went further and held that the respondent state was responsible for ensuring that the sentence of life imprisonment imposed on Scoppola was replaced by a penalty consistent with the principles set out by the ECtHR in that ruling. *Scoppola* is thus a precedent of *del Río Prada*, *supra* note 1, in the ECtHR's new path indicating the type of measures that might be taken in order to put an end to the situation that gave rise to the finding of a violation.

<sup>78</sup> Van Drooghenbroeck, 'Les bornes du texte et les limites de la créativité prétorienne', 84 *RTDH* (2010) 853, at 854.

happened before.<sup>79</sup> These judgments serve as a reminder on the part of the ECtHR judges that retroactivity *in malam partem* is absolutely banned. Despite the margin of appreciation that states enjoy, both legislative and judicial changes have to respect the principle of non-retroactivity unless it operates to the individual's benefit. *Kafkaris* and *del Río Prada* concern the recognition of the application of Article 7 to a change in the national case law *in malam partem*, which took place after the commission of the facts. In *del Río Prada*, this change in the case law occurred even after the individual had been convicted.

In both cases, the ECtHR seems to doubt the relevance of its own previous doctrine about the difference between a measure 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', since their distinction is not always clearcut. In *Kafkaris* and *del Río Prada*, the Court found precisely that, despite appearances, the manner in which national authorities apply the regime of execution of sentences goes beyond the mere enforcement of a penalty.

Despite their symmetries, the result of the *Kafkaris* and *del Río Prada* cases was not exactly the same for the applicants. In the former, only a partial violation of Article 7 was found, whereas in the latter the violation was complete. In the former, the violation of Article 7 was based on the meagre quality of the law, which was not formulated with sufficient precision at the material time. However, the Court did not find any violation of this provision in so far as the applicant complained about the retrospective imposition of a heavier penalty with regard to his sentence and the changes in the prison law exempting life prisoners from the possibility of gaining a remission of their sentence. Conversely, in *del Río Prada*, the violation of Article 7 was based on the entire provision. The distinction made by the ECtHR between a partial/complete violation of Article 7, together with the non-recognition in *Kafkaris* of a violation of Article 5 and the finding in *del Río Prada* that since 3 July 2008 the applicant's detention had not been 'lawful', in violation of Article 5 of the ECHR, are the reasons why the Court recommended the release of del Río Prada at the earliest possible date, a measure that it did not dare to take in the case of Kafkaris. So the final results of the two cases differ, and, despite the reasons given by the Grand Chamber, it is difficult to ascertain the fundamental differences that existed between them. At the material time, both applicants had reason to believe that their period of imprisonment would be shorter than the one established in their sentences. Del Río Prada is probably satisfied, unlike Kafkaris.

*Kafkaris* and *del Río Prada* represent two successive steps in the Strasbourg Court's evolution in applying the principle of legality. From the first rigid decision of the European Commission on Human Rights in *Hogben*, continuing with the resolution of *Kafkaris* and the following judgments about the principles *nullum crimen sine lege* and *nulla poena sine lege*, until the solution to *del Río Prada*, the Court has steadily developed each time a more flexible way to approach the concepts of penalty, foreseeability and enforcement of penalty to the individual's benefit, therefore enhancing the protection of human rights.

<sup>79</sup> S. Van Drooghenbroek, *La proportionnalité dans le droit de la CEDH* (2001), at 670.