The Principle of Legality in Criminal Law under the ECHR*

Abstract

This article critically analyses the case-law of the European Court of Human Rights on Article 7 ECHR. It sets out the details of the principle of legality (nullum crimen sine lege) in criminal law and examines the manner in which the Court has developed the principle to encompass three overlapping rules: only the law can define a crime and prescribe a penalty; the prohibition on retrospective criminal law and the prohibition on the imposition of harsher penalties. It also addresses the limitations on the principle and the Court's attempt to 'balance' the nullum crimen principle against the spirit of the Convention in certain key cases.

Introduction

The core of the rule of law in criminal law can be found in Article 7 of the European Convention on Human Rights (ECHR) and its requirement of *nullum crimen, noella poena sine lege*.[1] Article 7 ECHR is a non-derogable clause, and so cannot be avoided in times of national emergency.[2] This places it alongside the prohibitions on torture and slavery as a 'higher-value' ECHR provision.[3] The importance of the principle of legality in criminal law has been emphasised by the European Court of Human Rights (ECtHR). In the recent case of *Kafkaris*, the Court declared that

> [t]he guarantee enshrined in Article 7, which is *an essential element of the rule of law*, occupies a prominent place in the Convention system of protection … It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.[4]

Similar statements concerning the rule of law had been made in previous cases.[5] However, despite the Court's rhetoric, Article 7 ECHR is in many respects the poorer relation to the better-developed Article 6 ECHR (right to a fair trial). Although the 1990s saw Article 7 ECHR considered for the first time, the number of cases citing the Article remains low. In a survey conducted by Greer in 2006, he noted that only nine breaches of Article 7 ECHR had been

* Cian C. Murphy, University Research Fellow, The City Law School, City University London.

1 'No crime, no penalty, without law'.
2 Article 15 ECHR.
3 S Greer *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006 Cambridge CUP) 233.
4 *Kafkaris v Cyprus* Judgment 12 February 2008 para 137 (emphasis added).
5 See for example *K.-H.W. v Germany* Judgment 22 March 2001.

identified by the Court in the years 1999-2005. By way of comparison, over 2000 breaches of Article 6 ECHR were found in the same period.[6] In academia, the Article is oft-cited but little discussed.[7] The leading textbooks on the Convention, including those by Janis, Kay & Bradley, and Jacobs & White, each only devote a handful of pages to the clause.[8]

The Article itself is similar to its equivalent (Article 15) in the International Covenant of Civil and Political Rights (ICCPR). In this study, the Article is described as entailing three distinct (but overlapping) rules. First, only the law can define a crime and prescribe a penalty. Second, conduct may not be subject to retrospective prohibition. Third, conduct may not attract a higher penalty than that provided for in law when the action took place.[9] These three prohibitions are subject to the single explicit limitation on the rule contained in Art 7(2) ECHR. Each aspect is considered in turn in the following discussion.

Only the Law can Define a Crime and Prescribe a Penalty

The first rule was recently restated in *Kafkaris*: 'only the law can define a crime and prescribe a penalty'.[10] This rule deals with three concepts – law, crime and penalty. Despite some discussion on the meaning of both *law* and *penalty*, the ECtHR has not engaged in discussion on the meaning of *crime*.[11] Rather than offer a Convention-level definition of 'crime', the Court has indicated that the formulation of criminal justice policy is a matter for the states themselves.[12]

Law

The Court considers the term 'law' to be an autonomous one within the Convention scheme:

> When speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law…

---

[6] S Greer *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006 Cambridge CUP). Obviously counting breaches is not an ideal way to determine how well-developed a right is. In an ideal world, a low violation count would be evidence of high compliance. Nonetheless, in the context of increasing pleas to the ECtHR, the under-use of Article 7 ECHR is unusual.

[7] For two relatively recent discussions, see R Beddard 'The rights of the "criminal" under Article 7 ECHR' (1996) EL Rev Supp (Human Rights Survey) 3-13; S Atrill 'Nulla Poena Sine Lege in comparative perspective: retrospectivity under the ECHR and US Constitution' (2005) Spring PL 107-131.

[8] M W Janis, R S Kay, A W Bradley *European Human Rights Law: Text and Materials* (2008 Oxford OUP); C Ovey and R White *Jacobs and White: the European Convention on Human Rights* (2006 Oxford OUP).

[9] *Kafkaris*, para 138.

[10] *Kafkaris*, para 138.

[11] Case-law does exist on the meaning of 'criminal charge' in the context of Art 6(1) ECHR and the right to a fair trial. However, the development of 'criminal charge' is linked more closely to the discussion of 'penalty' (see below) than any more general concept of 'crime'. *Engel v Netherlands* Judgment 8 June 1976. See also *Welch v UK* Judgment 9 February 1995.

[12] *Kafkaris*, para 151.

> In this connection, the Court has always understood the term 'law' in its 'substantive' sense, not its 'formal' one. It has thus included both enactments of lower rank than statutes and unwritten law… In sum, the 'law' is the provision in force as the competent courts have interpreted it.[13]

This determination to reserve to itself the meaning of the term 'law' (and also 'penalty') prevents Member States from frustrating the Art 7 ECHR prohibition by means of domestic characterisation.[14] The Court has taken a generous view of 'law', and not limited the term's application to acts of legislatures. In the case of *SW & CR v UK*, the status of the common law as 'law' was upheld.[15] The infamous cases concerned two men who were prosecuted for forcing their wives to have sexual intercourse with them. While the common law had previously considered husbands immune from charges of rape against their wives, this position was changed by the House of Lords in *R v R*.[16] As a result, the two applicants were prosecuted and convicted. The Strasbourg Court noted that 'the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 ... cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation'.[17] The question of foreseeability is considered below. For present purposes it suffices to note that the ECtHR did not hesitate to approve the role of the common law in developing the definition of offences and defences.

In *Custers & Others*, the ECtHR considered whether executive orders, issued by Danish authorities with responsibility for Greenland, could be considered 'law'. The Court decided that it had to determine whether the relevant order had 'sufficient legal basis in domestic law'. It took a deferential approach in its examination, declaring that it 'will not question the national courts' interpretation of domestic law unless there has been a flagrant non-observance or arbitrariness in the application of the said provisions'.[18] The legality of the order was upheld.

Public international law may also have a role – particularly where it is the basis for offences in national law. In *Jorgic v Germany*, the applicant was convicted of genocide under German law. He contended that the German courts had adopted a broader interpretation of genocide than could

[13] *Kafkaris*, para 139.
[14] *Beddard*, 5.
[15] *SW & CR v UK* Judgment 22 November 1995.
[16] *Regina v R (Marital Rape Exemption)* [1992] 1 AC 599.
[17] *SW & CR*, para 36.
[18] *Custers, Deveaux and Turk v Denmark* Judgment 3 May 2007, para 84.

be based in German or public international law.[19] For the purposes of interpreting the 'law' in this case, the ECtHR relied on international legal instruments such as the Genocide Convention 1948 and the Statute of the International Criminal Tribunal for Yugoslavia as well as the opinions of leading academics.[20] The Court held that based on these sources, the definition used in Germany was no so broad as to offend Article 7. The use of international criminal law was also relevant in the recent cases of *Kononov* and *Korbely* – with the Court once again finding that national law can be interpreted in light of international rules.[21]

The Court's broad reading of 'law' does have its limits. As discussed below, law must meet qualitative requirements of accessibility and foreseeability. The Court appears to give greater priority to the law of 'States subject to the rule of law'.[22] In two German reunification cases, the Court was required to consider the legality of the prosecution for murder of former East German (GDR) state officials. In *K.-H.W.* the applicant was a border guard who had shot dead a citizen of East Germany trying to flee to West Berlin.[23] In *Streletz & Others*, the applicants were members of the GDR ruling elite.[24] Under the terms of German reunification, all of the applicants had been tried under GDR law.[25] The Bundesverfassungsgericht (BVerfG), and subsequently the ECtHR were required to consider the status of the applicants' defences under that legal system. Agreeing with the lower German courts, the BVerfG held that the requirements of objective justice made it impossible to accept these defences. The ECtHR itself did not comment on this *ratio*, noting that interpretation and application of national law are matters for the national courts.[26] The Strasbourg Court considered the 'unwritten law', specifically the GDR decision not to prosecute the applicants at the time of their offence. The Court held GDR state practice

> emptied of its substance the legislation on which it was supposed to be based, and which was imposed on all organs of the GDR,

[19] *Jorgic v Germany* Judgment 12 July 2007, para 89.
[20] *Jorgic*, paras 40-55.
[21] *Kononov v Latvia* Judgment 24 July 2009; *Korbely v Hungary* Judgment 19 September 2008.
[22] *K.-H.W. v Germany* Judgment 22 March 2001, paras 84-85.
[23] *ibid*.
[24] *Streletz, Kessler and Krenz v Germany* Judgment 22 March 2001.
[25] In *K.-H.W.*, para 50, the ECtHR noted that the 'legal basis for the applicant's conviction was therefore the criminal law of the GDR applicable at the material time, and his sentence corresponded in principle to the one prescribed in the relevant provision of the GDR's legislation…'.
[26] *K.-H.W.*, para 61.

> including its judicial bodies, [and therefore] cannot be described as "law" within the meaning of Article 7 of the Convention.[27]

This is at odds with the Court's position in *Kafkaris* where it held that it 'must have regard to the domestic law as a whole and the way it was applied at the material time'.[28] Furthermore, it seems inherently contradictory for the Court to hold that it was legitimate to prosecute the applicants on the basis of the relevant GDR law, but not to permit them to rely on the defences provided therein. It appears that here the Court has defined 'law' to remove elements of the case that would make its decision harder to justify. It would have been better to consider the cases entirely in the context of foreseeability and retrospectivity. As it is, the decision indicates a willingness to base the definition of law on the moral content of the norms. Article 7 ECHR seeks to provide certainty by requiring government in accordance with prior rules. The certainty this offers individuals is vitiated if courts can deprive rules of their legal character after the fact.

Penalty

The Court has taken a similar 'autonomous' approach to the meaning of penalty. The leading case is *Welch v UK*. Welch was convicted of drug-related offences. He argued that a confiscation order made against him constituted a retrospective criminal penalty. The order allowed broad powers of seizure of his assets and breach of the order could result in incarceration. The British Government did not dispute the retrospectivity of the order but claimed that it was not a criminal penalty as it was concerned with the prevention of future drugs trafficking.[29] The Commission considered the order to be 'reparative and preventative' in nature, and therefore not a penalty.[30] In its judgment, the Court set out the meaning of the term:

> The concept of a "penalty" … is, like the notion of "civil rights and obligations" and "criminal charge" in Article 6 para 1. … an autonomous Convention concept… To render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty".[31]

---

[27] *K.-H.W.*, para 90. Similar difficulties with successive legal systems were addressed in *Kononov v Latvia* Judgment 24 July 2009.
[28] *Kafkaris*, para 145.
[29] *Welch v UK* Judgment 9 February 1995 paras 22-25.
[30] ibid.
[31] ibid, para 27.

According to the ECtHR, the first consideration is whether the measure follows conviction for a criminal offence. Other relevant factors are 'the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity'.[32] In *Welch*, the combination of these factors gave rise to the conclusion that the confiscation order was a criminal penalty. As it was applied retrospectively, there was a breach of Article 7 ECHR. However, the Court limited its decision insofar as it was only concerned with the retrospective imposition of such a penalty, and did not 'call into question in any respect the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking'.[33]

Following *Welch*, it was not clear if a measure could be a "penalty" when its imposition does not follow conviction for a criminal offence. The Court had another opportunity to address this question in *Jamil*.[34] The central issue in that case was whether imprisonment in default of payment of a fine (for a drugs offence) constituted punishment. Regarding the first *Welch* criteria, the Court noted that the imprisonment was imposed 'in a criminal-law context'. However, as imprisonment in default could also be imposed in other contexts, it was therefore necessary to consider the other factors. Having conducted an examination of the case in the context of the other *Welch* factors, the Court concluded that the imprisonment did indeed amount to a penalty.[35] The *Jamil* judgment is too brief to offer conclusive proof of the inter-relationship of the different *Welch* criteria. However, the Court's approach appears to indicate consideration of the other factors should only take place if the measure under scrutiny follows a criminal conviction.[36] This conclusion is supported by the decision of the European Commission on Human Rights in *Ibbotson*. In considering the requirements for sexual offenders to register their address with the police, the Commission noted that the presence of a conviction is the "starting point" for the test.[37] Therefore, it appears that a conviction is a prerequisite for a measure to be considered a 'penalty'.

[32] *ibid*, para 28.
[33] *ibid*, para 36.
[34] *Jamil v France* Judgment 25 May 1995.
[35] *Jamil*, para 32.
[36] *ibid.*
[37] *Ibbotson v United Kingdom* Decision of the European Commission of Human Rights 21 October 1998. The Commission held that on the facts the requirement to register did not constitute punishment and declared the application inadmissible.

The matter is of particular relevance today as many highly punitive but ostensibly preventive measures are pursued without recourse to criminal proceedings.[38] While the state's actions may be well intentioned (improving public safety), preventive measures inevitably interfere with Convention rights. Without the benefit of the requirement of legality, individuals may find it more difficult to know where the boundaries of permissible and impermissible behaviour lie. In this regard, it useful to consider the relationship between the idea that *only the law may prescribe a penalty* and the principle in Articles 8 – 11 ECHR, that interferences with rights must be *prescribed by law*.[39] Two Turkish cases illustrate the point. In *Erdogdu* and *Ince* the applicants were prosecuted under section 8 of the Prevention of Terrorism Act 1991. The applicants claimed a breach of their rights under Articles 7(1), 9 and 10 ECHR. Under Article 7(1) ECHR, they claimed that the national legislation was 'so vague that it had not enabled them to distinguish between permissible and prohibited behaviour'.[40] Despite this argument, they made no claim that their Article 10 rights were not 'prescribed by law', even though the same measure alleged offended both Articles.[41] The ECtHR noted that as it had found the interference prescribed by law for the purposes of Article 10, it would find no violation under Article 7(1) either.[42] In *Baskaya*, a similar case decided on the same day, the Court noted that the arguments submitted regarding the Article 10(2) ECHR prescribed by law requirement were substantially the same as those offered under Article 7(1) ECHR.[43] The ECtHR held that 'the requirements under the two provisions are largely the same'.[44]

The broader principle of legality was also at the heart of the recent decision in *Gillan*. The Court reviewed the stop and search of two individuals attending a protest at an arms fair. They were stopped and searched under section 44 Terrorism Act 2000 – a legislative provision which does not require the police officer to have a 'reasonable suspicion' of unlawful activity. The Court held that the searches breached Article 8 ECHR as they were not 'in accordance with law' as the powers were not 'sufficiently circumscribed nor subject to adequate legal safeguards against

---

[38] M Feeley & J Simon 'Actuarial Justice; the Emerging New Criminal Law' in D Nelkin (ed) *The Futures of Criminology* (1994 London Sage) 173-201, 173. Preventive measures have been particularly contentious in recent years in the UK with Anti Social Behaviour Orders raising questions about the limits of the principle of legality as a safeguard against civil/administrative penalties. See, for discussion C. Bakalis 'Asbos, "Preventative orders" and the European Court of Human Rights' (2007) EHRLRev 427; A. Ashworth 'Social control and "anti-social behaviour": the subversion of human rights?' (2004) LQRev 263.

[39] Article 8 uses the language 'in accordance with law' while Arts 9-11 use 'prescribed by law'. Nothing, however turns on the distinction and the latter is used here to refer to the general principle. See generally Greer, *op. cit.*, 201-203.

[40] *Erdogdu and Ince v Turkey* Judgment 8 July 1999, para 26.

[41] *ibid*. para 36.

[42] *ibid*, para 59.

[43] *Baskaya and Okcuoglu v Turkey* Judgment 8 July 1999, para 48.

[44] *ibid*, para 49.

abuse'.[45] Whether *Gillan* is indicative of a more stringent application of the principle of legality in criminal justice or simply a one-off finding of violation remains to be seen.

While the requirement that interferences be 'prescribed by law' offers protection to individuals, it not necessarily as effective a safeguard as Article 7(1). Two problems exist in this respect. First, applicants often fail to take issue with the Government's claim that the interference is prescribed by law and the Court is generally deferential to domestic legal systems on this point. Fenwick notes 'the notion of "prescribed by law" has been focused upon to some extent, but always with the result that it has been found to be satisfied'.[46] The second problem relates to timing. The ECtHR has noted an important difference between the imposition of a criminal penalty without law and an interference with a right that is not prescribed by law. In the former instance the legal basis must exist at the time of the citizen's sanctioned action (and not simply at the time of their censure by the state). Conversely, the legal basis for an interference with a right under Arts 8 – 11 must exist at the time of the interference itself.[47] The result is the permissibility of retrospective measures that interfere with rights, so long as there is a legal basis *at the time of the interference* and the interference does not amount to a criminal prosecution.

The Court's formalist approach to the definition of 'penalty' – requiring a prosecution for the protection to be triggered – may facilitate an evasion of the rule of law. Article 7 ECHR was conceived in a world where legal systems dealt with deviance through criminal prosecution. Its prevention of arbitrary prosecution was aimed at shielding the individual from the most powerful tool of the state. If law enforcement is no longer concerned with prosecution and punishment, Article 7 ECHR runs the risk of obsolescence. This shift makes it more difficult for individuals to plan their affairs, as behaviour that is legal when it is carried out may subsequently become the basis for an interference with rights. Obviously the general protection of Articles 8 – 11 still exist. However, as Fenwick points out, the principle of legality is weaker in relation to these Articles than it is under Article 7(1). The Court would do well to consider the 'criminal prosecution factor' as only one criterion among many, and pay at least as much attention to the severity of the measure imposed. Otherwise it may allow far greater interference with rights under the guise of 'prevention' than it ever did in the name of 'punishment'.

Accessibility and Foreseeability

In *Kafkaris*, the Court noted that the definition of both the offence and the penalty must be

[45] *Gillan and Quinton v the United Kingdom* Judgment 12 January 2010, para 87.
[46] H Fenwick *Civil Liberties and Human Rights 4th Edition* (Abingdon Routledge 2007), 68-9.
[47] *Baskaya*, para 50.

accessible and foreseeable.[48] These twin requirements have consistently featured in the Court's case-law, even outside the context of Article 7(1) ECHR.[49] Although frequently mentioned in Article 7 judgments, it is not clear if accessibility and foreseeability are related but distinct qualities, or are one and the same. Despite inconsistencies in the language used by the Court, it is possible to distinguish two different elements. First, the law must be sufficiently clear for individuals to conduct themselves in accordance with its commands (accessibility), and second, where there is judicial development of the law, any changes must be predictable (foreseeability).

Accessibility and foreseeability do not prevent laws from being broadly drafted where this is necessary for the law to fulfil its role. As a result, laws concerned with offences such as prosyletism and terrorism may be vague, but still compliant with Article 7 ECHR.[50] Regarding the 'clarity' of the law (accessibility in the plain meaning of the word), the Court has noted that

> An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable and what penalty will be imposed... a law may still satisfy the requirement... where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[51]

The 'thin ice' principle is relevant here. Lord Morris described this as the idea that 'those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he [sic] will fall in'.[52] Despite Ashworth's claim that the 'thin ice' principle should not 'trump' the absolute Article 7(1) right,[53] the European Court seems willing to allow it to do so. In *Coeme*, it was held that 'the applicants could not have been unaware that the conduct that they were accused of might make them liable to prosecution'.[54] Similarly in *Custers & Others*, the Court declared that it was predictable that 'the applicants risked being sentenced to a fine'.[55] This reference to *risk* that criminal sanctions *might* follows counteracts the foreseeability requirement.

---

[48] *Kafkaris*, para 140.
[49] *Sunday Times v UK* Judgment 26 April 1979, para 49.
[50] *Kokkinakis*, *Erdogdu*.
[51] *Kafkaris*, para 140.
[52] *Knuller v DPP* [1973] AC 435. The case was cited and discussed in A Ashworth, *Principles of Criminal Law* (Oxford OUP 2009) 63 *et seq*.
[53] *ibid.*
[54] *Coeme & Others v Belgium* Judgment 22 June 2000, para 150.
[55] *Custers & Others v Denmark* Judgment 3 May 2007, para 81.

The point was put particularly clearly in *Cantoni*. The Court declared that there are always 'grey areas at the fringes of the definition [of the law]' and Article 7(1) ECHR simply requires that the law is 'sufficiently clear in the large majority of cases... the applicants must have known on the basis of their behaviour that they ran a *real risk of prosecution*'.[56] Finally on this point, if consulting the courts is necessary for the precise meaning of the law to be determined, then Article 7 ECHR must be understood as having strong links to an individual's right to legal counsel and access to justice more broadly.

The second qualitative element relates to changes to the law (foreseeability properly understood). The ECtHR has consistenly held that it does not undermine the foreseeability of the law if it is adapted to reflect changing social circumstances. This change may be gradual,[57] or in certain circumstances,[58] may be abrupt. Gradual change is demonstrated in *SW & CR v United Kingdom*. There, the ECtHR held that the removal of the marital rape exception by common law development was foreseeable. It held that the House of Lords judgment

> did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife... there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law.[59]

Despite the apparent foreseeability, *SW and CR* has been the subject of criticism. Beddard notes that in the unlikely event that the applicants had sought legal advice prior to committing the acts, the advice would most likely be that while reform was imminent, the exception was still valid law in the UK. Furthermore, such a profound change in the law of criminal liability should arguably be the province of the legislature not the judiciary.[60]

---

[56] *Cantoni v France*, Judgment 22 October 1996, para 32-5.
[57] *SW & CR*, para 36.
[58] *K.-H.W.; Streletz & Others*.
[59] *S.W. and C.R. v UK*, para 43.
[60] R Beddard 'The rights of the "criminal" under Article 7 ECHR' (1996) EL Rev Supp (Human Rights Survey) 3-13, 10-11.

In the German reunification cases, the Court noted that changes to the law may be more dramatic. As discussed above, the Court held it legitimate for the unified German courts to convict based on GDR law, even where the organs of the former state would not have done so. The Court also commented on the foreseeability of the applicants' prosecution. It reiterated that the criminal law must be adapted to 'changing circumstances'. Whereas this usually happens gradually, the Court held it was 'wholly valid where, as in the present case, one State has succeeded another'. The reasons offered to sustain this conclusion were that (i) it was consistent with the system of the Convention, (ii) the GDR Parliament has expressed such a wish, and (iii) due to the 'pre-eminence' of the right to life in international human rights instruments.[61] None of these reasons can truly justify what is, in essence, a retrospective change to an entire legal system. It is argued below that the marital rape and German reunification cases are better read as the 'balancing' of Article 7 ECHR with the general spirit of the ECHR. In other, more mundane circumstances, the ECtHR has held a dramatic departure from precedent to offend the requirement of foreseeability. In *Pessino*, a builder was prosecuted for carrying out construction in violation of a Court order prohibiting him from doing so. Similar breaches of such Court orders in the past had not attracted criminal liability. The abrupt change in approach by the French Court of Cassation resulted in a breach of Article 7.[62]

As the Court itself has noted the law must change to adapt to the facts of society it serves. When this occurs through the legislative process, there is at least the warning that process provides, and the democratic legitimacy derived from the institution. When criminal law is abruptly changed by courts, neither warning nor legitimacy are the same (no matter how may academics or official reports may have foreshadowed it). Article 7 requires that the guiding principle should always be the ability of individuals to plan their affairs in accordance with the law.

A Third Requirement?: 'Quality of Law'

In *Kafkaris*, the Court found a violation on grounds of the 'quality of law' for the first time. The applicant was convicted of the contract killing of a Cypriot public figure and his two children. Upon his incarceration to serve a 'life sentence', the applicant was served with a document citing his release date as June 2002. This was in keeping with the Regulations in force at the time, which described 'life imprisonment' as constituting twenty years' imprisonment. Following further developments, the regulations were changed and the applicant was informed that he

[61] *K.-H.W.* paras 82-90.
[62] *Pessino v France* Judgment 10 October 2006.

would be incarcerated for the remainder of his life unless he could provide the name of the person who hired him. The ECtHR held there was a deficiency in the 'quality of law':

> At the time the applicant committed the offence, the relevant Cypriot law taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution.[63]

The deficiency resulted in a violation of Article 7 ECHR. Despite this breach, the Court held that the declaratory judgment constituted just satisfaction, and the judgment was not to undermine the continued detention of the individual. This outcome is unconvincing. The principal concern the majority had with the facts was that the applicant had been lead to believe, by a form specifying a potential release date, that he would serve a twenty-year term. The Court's difficulty was therefore not with the law, but with the State practice implementing it. If this was the case, it is not clear why the Court bothered to discuss the 'quality of law' at all. It has consistently held that there is a difference between the imposition and enforcement of penalties (discussed below). Therefore, it could simply have decided that the State was within its discretion in enforcing 'life imprisonment', and found no breach. Instead it chose to find a deficiency in the law, but offer no real remedy to the applicant. This undermines the absolute nature of Article 7 ECHR. Furthermore, the deficiency found – the 'quality of law' – merely added to the confusion. The principle appears to be nothing more than a muddled mix of the existing requirements of accessibility and foreseeability, and it is unfortunate that the Court felt it necessary to relabel well-established principles. The best conclusion therefore is that *Kafkaris* should not be taken as establishing a further qualitative requirement, but simply applying the existing ones.

Retrospective Criminal Law

The second prohibition in Article 7(1) ECHR prevents states making behaviour unlawful after it has been committed. The prohibition on retrospective criminal law is related to the requirement of foreseeability, although the nature of that relationship is not clear. In the early case of *Kokkinakis*, the ECtHR noted that Article 7(1) ECHR

[63] *Kafkaris*, para 150.

> is not confined to prohibiting the retrospective application of the criminal law to the accused's disadvantage. It also embodies, *more generally*, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to the accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. [64]

It is not obvious from the judgment in *Kokkinakis* whether the law should be foreseeable (and therefore non-retrospective) or non-retrospective (and therefore foreseeable), or whether the two principles are of equal importance. The use of *more generally* to refer to the *nullum crimen* and *strict interpretation* rules suggests that these norms stand on equal, if not higher footing to the rule concerning retrospectivity. The importance of distinguishing between these principles should not be underestimated. If foreseeability is paramount, then retrospective changes to the criminal law (ie as appeared to occur in *SW & CR*) are permissible, so long as they could reasonably be predicted. On the other hand, if non-retrospectivity is the guiding principle, then no amount of foreseeability could save retroactive criminalisation. Subsequent restatements of these basic principles, in particular in *Kafkaris*, suggest that non-retrospectivity *stricto sensu* and foreseeability should stand on equal footing.[65]

For some members of the Court, non-retrospectivity is the entirety of Article 7 ECHR and discussions regarding 'quality of law' are misleading and irrelevant.[66] Admittedly, the idea of 'quality of law' discussed above is a regrettable one. But it is clear that in the opinion of the majority, if Article 7(1) ECHR is to have real value, accessibility and foreseeability must be upheld. While the relationship between these qualitative requirements and the non-retrospectivity rule might seem insignificant, it is of real relevance to whether or not a violation should be found in a case such as *SW & CR*. The Court would do well to clarify the broader principles underpinning the right rather than allowing the law to develop on an ad hoc basis in hard cases.

---

[64] *Kokkinakis v Greece* Judgment 25 May 1993, para 52.

[65] See para 138 *et seq* where Article 7 is described as embodying 'in general terms, the principle that only the law can define a crime and prescribe a penalty'. All else appears to follow from this general statement. See also *Protopapa v Turkey* Judgment 24 February 2009 para 93.

[66] Judges Loucaides and Jočienė found no breach on grounds of 'quality of law'. The former, in writing the partially dissenting opinion, noted that '[t]he basic scope and objective of Article 7 is to prohibit the retrospective effect of criminal legislation'. The dissent appears to limit the ideas of qualitative requirements to the context of the 'prescribed by law' criterion. Such a reading is far more restrictive than any ever offered by a majority.

The Imposition of Harsher Penalties

The third and final prohibition in Article 7 ECHR prevents a harsher penalty from being imposed than that prescribed by law at the time the offence was committed. This has proven to be one of the more successful grounds of appeal to the Court under Article 7 ECHR. In the *Welch*, *Baskaya* and *EK* cases, the Court found a breach of Article 7 ECHR on grounds of a heavier sentence being imposed on an individual than that provided for in law. In *Welch*, the applicant was retrospectively subject to a confiscation order that was not provided for in law at the time he committed the offence.[67] In *Baskaya* and *EK*, the applicants were subject to penalties provided for in a statutory provision aimed at editors of publications. As the applicants were publishers rather than editors, the punishment was held to be in violation of Art 7 ECHR. These two latter cases are also examples of the requirement that the law is not interpreted by analogy to the detriment of the accused.[68]

The Court draws a distinction between the imposition of a penalty and the enforcement of that penalty. This distinction is not a clear one and in *Kafkaris* it appears to be reduced to nothing. The applicant had a 'life sentence' imposed. Originally constituting twenty years' imprisonment, he was subsequently informed the sentence would be 'enforced' for the rest of his life. Though the penalty's label had not changed the substance had. Despite this, the ECtHR did not find a breach of Article 7 on this ground, as the prolonging of the sentence concerned the enforcement rather than the imposition of a sanction. The Court relied on three cases in applying the distinction.[69] Of the three, it is *Hogben* that most closely resembles the *Kafkaris* case. However, the applicants' situations are almost mirror opposites. Hogben was sentenced to life imprisonment, and (as noted in the Commission decision) *no minimum tariff was set*. Thus, his initial sentence was a 'life sentence' of indeterminate length.[70] Kafkaris, in contrast, was informed at the time of his imprisonment that he would serve twenty years – a sentence in keeping with the Regulations effective at the time. While both cases concern a change in the effective punishment being served by the applicant, it is only in *Kafkaris* that the change is to the manifest detriment of the applicant.

---

[67] *Welch v UK* Judgment 9 February 1995.

[68] *EK v Turkey* Judgment 7 February 2002; *Baskaya & Other v Turkey* Judgment 8 July 1999, para 42.

[69] *Hogben v UK Judgment* European Commission of Human Rights 3 March 1986; *Hosein v UK* Judgment European Commission on Human Rights 28 February 1996; *Uttley v UK* Judgment 29 November 2005.

[70] While the subsequent developments might have given rise to hopes of early release (after 14-15 years), the result of the change in policy was to turn an indeterminate sentence into one of relatively clear length. This noted, it was still possible that he would be released prior to the twenty year period if he could demonstrate the "wholly exceptional circumstances" referred to by the Government.

It is not at all clear that the distinction between imposition and enforcement is applicable in such circumstances, and even if it is, that it can justify such a severe outcome.[71]

A final, recent development in this area is the incorporation of the rule requiring the retrospective application of a more lenient penalty. In *Scoppola*, the Court drew on the EU Charter of Fundamental Rights – Article 49 of which incorporates the *nullum crimen* principle – to conclude that Article 7 ECHR must now be considered to include the more lenient penalty rule.[72] The Court's reasoning, based around 'a consensus [that] has gradually emerged in Europe' is compelling.[73] It was nonetheless criticised by a minority of six judges as rewriting the Article and thus overstepping the limits of judicial interpretation.[74] The future development and application of the rule will therefore merit continuing scrutiny.

Limitations on the Principle of Legality

Article 7 is an absolute and non-derogable right. Therefore, on the face of it, it should not be subject to limitation, except for the sole explicit exception provided in Article 7(2) ECHR. The exception clause was written with a view to ensuring the legitimacy of the trial for war crimes of members of the Nazi regime after World War II. However, it is broadly drafted, not limited to war crimes and could potentially allow state authorities to prosecute an individual for a wide range of acts prohibited in other states. Despite the existence of only one explicit limitation, the Court has tempered the absolute nature of the prohibition through a mixture of pragmatism in the definition and application of terms; selected deference to national criminal justice authorities; and the occasional use of a dubious balancing act.

It is clear from the case-law analysed above that the ECtHR favours solving the problem before it to laying down general statements of law. As a result its jurisprudence can be criticised as under-theorised and lacking a clearly principled approach. Greer notes that when faced with the non-derogable Convention provisions, the ECtHR has limited its definitions to achieve satisfactory results.[75] This certainly appears to be true in the instant case. The Courts' approach

[71] A related point in this regard is the lack of clarity concerning harsher penalties in the context of recidivism. The key case is *Achour v France*. In 1984 the applicant had been convicted of a drug trafficking offence. Under the law existing in France at the time, the period during which reoffending would attract a higher sentence for recidivism expired in 1991. In 1994, new legislation extended this period to ten years after the completion of the sentence (1986 in the applicant's case, giving a new expiration date of 1996). In 1995 the applicant committed another offence and was prosecuted. In sentencing, the judge imposed a sentence which was aggravated by the applicant's status as a recidivist. The ECtHR found no breach of Article 7 ECHR. *Achour v France* Judgment 29 March 2006.
[72] *Scoppola v Italy (No. 2)* Judgment 17 September 2009 paras 105-109.
[73] *ibid.*, para 105.
[74] *ibid.*, Partly dissenting Opinion of Judge Nicolaou, joined by Judges Bratza, Lorenzen, Jociené, Villiger and Sajó.
[75] Greer, *op cit.* p 241.

to the definition of 'law' and 'penalty' has been a pragmatic one. It has eschewed broad statements in favour of facts-based judgments. In addition to the pragmatic definition of relevant terms, there also appears to be a tendency by the Court to prefer to do justice by finding violations of other rights. In *Kokinakis*, a case dealing with proselytism, no breach was found under Article 7, but the applicant's conviction was held to offend Article 9 ECHR (freedom of religion). Similarly in *Erdogdu*, the Court refused to find a breach under Art 7 ECHR as a result of the vagueness of section 8 of the Turkish Prevention of Terrorism Act 1991. Rather, the ECtHR held that the applicant's prosecution breached their Art 10 ECHR rights (freedom of expression). The Court's reliance on these other rights allows it to protect individuals without more generally undermining the integrity of the defendant state's law. Even where breaches of Article 7 are found – as in *Welch* – the Court is at pains to limit the effect of its judgment.[76] The result of this pragmatism is an under-developed and under-theorised *nullum crimen* principle.

Article 7 ECHR is unusual in that the Court is willing to depart from its usual policy of considering the interpretation of national law a matter for domestic courts. However, this departure is subject to a threshold – the Court will only truly question the national courts' interpretation where there has been 'flagrant non-observance or arbitrariness'.[77] In a recent survey, Mowbray identified certain aspects of domestic criminal justice as an area where the Court allows greater discretion to national authorities.[78] The Court clearly defers to the national authorities in areas surrounding the enforcement of penalties, even to the point of handing down judgments that lack any real effect. *Kafkaris* is the key example of this deference. The Court's reluctance to force the Cypriot authorities to release a contract killer is understandable. Nevertheless, it undermines both the absolute nature of the Article 7(1) ECHR prohibition, and the value of the Convention system in general, if clear breaches of the prohibition go unremedied. In *Airey*, the ECtHR held that 'The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[79] It is not clear how decisions such as *Kafkaris* can be reconciled with this dictum.

The final 'unwritten' limitation is perhaps the most contentious. Many of the applicants relying on Art 7(1) ECHR – alleged rapists, officials of an odious former regime, a war criminal – evoke

[76] *Welch*, para 36: 'The Court would stress, however, that this conclusion concerns only the retrospective application of the relevant legislation and does not call into question in any respect the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking.'
[77] *Custers & Others*, para 84.
[78] A Mowbray 'No Violations But Interesting: A Study of the Strasbourg Court's Jurisprudence in Cases where no Breach of the Convention has been Found' (2008) 14(2) European Public Law 237-260, 252.
[79] *Airey v Ireland* Judgment 9 October 1979, para 24.

little sympathy. In the context of other rights, such applicants might have found their claims frustrated by Art 17 ECHR. However, as Beddard notes, those who present themselves before the Court claiming a violation of Article 7(1) ECHR are almost certainly going to be 'criminals'. Therefore, it is important 'that the application of the Article should avoid moral judgment and confine itself, as far as possible to reviewing law making processes'.[80] Despite the importance of dispassionate objectivity, the European Court has been willing to bend the rules. Consider the following passage that concludes *SW & CR*:

> The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords … cannot be said to be at variance with the object and purpose of Article 7… the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity … with the *fundamental objectives of the Convention*, the very essence of which is respect for human dignity and human freedom.[81]

Appearing as it does, after the consideration of foreseeability, the above could reasonably be considered as either *ratio* or *obiter*. It is difficult not to read the passage as upholding the 'spirit' of the Convention at the cost of the text. Similar concerns could be raised in respect of the convoluted and unconvincing reasoning in *K.-H.W.* and *Streletz & Others*. Art 7 ECHR may sometimes place the Strasbourg bench in the unenviable position of having to uphold the rights of the most despicable applicants. While they might be reluctant to allow a charter grounded in human dignity to be used by those who have wilfully disregarded it, such use is the essence of the rule of law protected by Article 7 ECHR.

Conclusion

Article 7 ECHR is the hidden jewel of the Convention. This article provides but a critical overview of the developing case-law. The principle offers much scope for those targeted by the criminal justice system seeking to have their rights upheld and fertile ground for academic debate on the nature of the Convention protection. Three key areas in particular merit further attention:

---

[80] R Beddard 'The rights of the "criminal" under Article 7 ECHR' (1996) EL Rev Supp (Human Rights Survey) 3-13, 3.

[81] *SW & CR v UK*, para 44. Greer disagrees that this is a balancing act. Instead, he claims, 'the Court itself *defined* the scope of each right by identifying, through reference to contemporary standards, the underlying interests and values most at stake' (p 240). Unfortunately he does not elaborate on this claim.

first, the application of the principle following a change in the legal system, as in the German and Latvian cases; second, the developing definition of a 'penalty' in light of the increasing use of preventive measures; and third, the difficult distinction between the imposition and the enforcement of a penalty. Thus the next chapters in the Strasbourg bench's chain-novel are awaited with interest.