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The Rule of Law in Croatian Criminal Justice with a Case Study on Its Breach by Tackling War Profiteering and Privatisation

- **ABSTRACT:** *The rule of law, as enshrined in the Croatian Constitution, establishes the highest values of the constitutional order, including the principles of constitutionality and legality. It ensures that laws and procedures in Criminal Law are well-defined and accessible to all, and provide legal certainty. The presumption of innocence safeguards the rights of the accused and ensures fair trials. The text emphasises the importance of the separation of powers and the role of the Constitutional Court in upholding constitutionality and the principle of legality as one of the main principles of (substantive) Criminal Law. Special reference is made to the constitutional amendments and legal measures taken to address criminal offences related to privatisation and ownership transformation and the Law on Exemption from the Statute of Limitations for War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatisation, which is a unique “phenomenon” ensuing from the retroactive application of the law contrary to the principle of legality, existing only in Croatian Criminal Law. This paper explores the interplay between the rule of law and Criminal Law in Croatia, highlighting the principles and legal framework that ensure justice and the protection of individual rights in the criminal justice system.*
- **KEYWORDS:** rule of law, principle of legality, croatian criminal justice system, the law on exemption

1. Introduction

The concept of the Rule of Law may seem easy to understand, but challenging to articulate. As Smerdel noted, the “rule of law” is a system of political power

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based on respect for the Constitution, laws, and other regulations, both by citizens (addressees of legal norms) and those that hold state power (addressors of legal norms).¹ The rule of law is a principle wherein every person and entity is subject to the law, regardless of their social status, wealth, or power.² It upholds the principle that all individuals are equal before the law.³ It ensures that laws are applied consistently and impartially, without discrimination or favouritism.⁴ It is the foundation of democratic societies and ensures that everyone is treated equally under the law.⁵ The Report of the Secretary General of the United Nations states that the rule of law⁶

refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁷

The rule of law also means that laws must be clear, predictable, and applied consistently.⁸ This fundamental aspect guarantees that every person, regardless of their social status, wealth, or influence, is subject to the same legal standards. It provides a fair and level-playing field, promoting trust and confidence in the justice system.⁹ This principle is essential in maintaining peace, stability, and order in society.¹⁰ The rule of law should safeguard the autonomy and dignity of the individual, allowing people to express and realise their feelings, opinions, communication, and actions freely.¹¹ They are strictly limited by the law, that is, acting in accordance with positive law.¹² As Lauc noted, all laws, other regulations, and the actions of the authorities must be based on the law, that is, on a regulation

1 Smerdel, 2020, p. 9.

2 Omejec, 2013, p. 1087.

3 Ibid.

4 Ibid.

5 Ibid.

6 Security Council, 2004.

7 Security Council, 2004, p. 4, para. 6

8 Omejec, 2013, p. 1087.

9 Ibid.

10 Lauc, 2016, p. 51.

11 Ibid.

12 Ibid.

based on the law.¹³ This expresses the constitutional principles of constitutionality and legality.¹⁴ It asserts that all laws, regulations, and actions of authorities must be grounded in the law, specifically in a regulation that aligns with the law and Constitution. This fundamental principle is rooted in constitutional law in many legal systems world over.¹⁵ The principle of constitutionality refers to the idea that all laws and regulations must conform to the provisions and principles outlined in the Constitution. The Constitution is the supreme law of a country and sets out the fundamental rights, powers, and structural features of the government. Any law or regulation that contradicts the Constitution is considered unconstitutional and can be deemed invalid by the courts.¹⁶ The principle of legality encompasses the notion that all exercises of public power must have a legal basis. It requires that governmental actions and decisions be grounded in and authorised by law. This principle ensures that authorities do not exceed their powers or act arbitrarily, promoting the rule of law and protecting individuals' rights and freedoms.¹⁷ By adhering to the principles of constitutionality and legality, a government upholds the fundamental principles of democratic governance, separation of powers, and the protection of individual rights.¹⁸ It provides a framework for legal certainty, accountability, and the proper functioning of a just and fair legal system.¹⁹ The formal aspect of the rule of law refers to shaping state action, especially the division of power and competence of the legislative, executive, and judicial authorities.²⁰ Human rights and fundamental freedoms can only be limited by law.²¹ Stein emphasised that

the principles constituting the rule of law identified in this definition are both procedural and substantive. The principles are procedural, for example, in that the laws must be the supreme law of the land, publicly promulgated, equally enforced, and adjudicated by an independent judiciary. Additional procedural rules require that the laws must be fairly and equally applied, and that separation of powers must be observed in the enactment and adjudicative processes.

The principles of the rule of law are also substantive, in that the laws must be just and consistent with the norms and standards of

13 Ibid.

14 Smerdel, 2020, p. 9.

15 Ibid.

16 Ibid.

17 Ibid.

18 Ibid.

19 Ibid.

20 Ibid.

21 Ibid.

international human rights law. Also, the rule of law requires the avoidance of arbitrariness in the law.²²

A hierarchy of legal regulations characterises the rule of law. This implies positioning the democratic Constitution as the highest legal act and the most important social project.²³ Smerdel noted that despite these changes, however, the functions of the Constitution and their purpose remain stable and unchanged, despite some changes.²⁴ The functions of the rule of law are as follows: Limiting power; promoting and protecting human rights and fundamental freedoms; building and strengthening democratic constitutional and legal institutions and realisation of the constitutional principle (and ideal) of the rule of law.²⁵ Lauc noted that ‘the concept of constitutional governance is based on the ideas of the rule of law and constitutionalism, which boils down to the idea of obeying laws and not people.’²⁶ Constitutional rule is a rule in which the Constitution and the law limit each holder of power.²⁷ Thus, all people should be equal in front of the law. Even if this sounds very encouraging and good, there have been some obvious abuses of this principle, especially in German history. As Lauc emphasised

the concept of the rule of law (*Rechtstaat*),²⁸ developed in German doctrine at the end of the 19th and the beginning of the 20th century, placed more emphasis on the formal aspect, i.e. on the hierarchy and respect for legal regulations, than on their content.²⁹

The French concept of the rule of law (*etat de droit*) is important³⁰ and is the base of today’s concept of the rule of law. The material aspect of the rule of law is considered a set of ideals and reveals somewhat deeper and broader substantive perspectives.³¹ Therefore, it focuses less on the form and procedure and more on the values and goals to be achieved, promoted, and/or embodied.³² It insists on full respect for personal civil liberties – freedom of thought and expression, conscience and religion, movement, and public assembly, equality before law, the right to appeal, etc.³³ According to this, ‘the rule of law does not exist in a society

22 Stein, 2019.

23 Lauc, 2016, p. 48.

24 Smerdel, 2020, p. 3.

25 Ibid.

26 Lauc, 2016, p. 48.

27 Ibid.

28 See Radbruch, 1946, pp. 1, 11; more information are available at: VC (no date).

29 Lauc, 2016, p. 49.

30 Ibid.

31 Ibid., p. 51.

32 Ibid.

33 Ibid., pp. 51–52.

whose legal system is not specifically designed and intended to operationalise the values of freedom, dignity, fairness, justice, democracy, and human rights.³⁴ Fundamental human rights must be respected and the welfare state must exist. As Lauc emphasised ‘the rule of law exists only when the legal system is built on a certain public morality, that is, on the understanding that good and bad regulations should be distinguished in relation to their content.’³⁵ This material aspect of the rule of law is present and evident in legal systems ‘that inherit the European continental legal tradition.’³⁶ Lauc³⁷ reiterated the importance of the Report on the rule of law of the Venice Commission of the Council of Europe (2011).³⁸ The Venice Commission³⁹ established the ‘necessary elements of the rule of law,’ as well as those *Rechtsstaat*, which are not only formal, but also substantial or material for ‘which it seems that a consensus could be found,’ namely:

1. legality, including a transparent, accountable, and democratic process of passing laws;
2. legal certainty;
3. prohibition of arbitrariness;
4. access to justice before independent and impartial courts, including judicial review of administrative acts (access to justice before independent and impartial courts, including judicial review of administrative acts);
5. respect of human rights and
6. prohibition of discrimination and equality before the law (non-discrimination and equality before the law).⁴⁰

Later, this definition was expanded with eight “constituent parts” of the rule of law:

1. accessibility of the law, which means that it must be intelligible, clear, and predictable;
2. questions of legal right must normally be decided on the basis of the law, not on the basis of discretion;
3. equality before the law;
4. powers must be exercised lawfully, fairly and reasonably;
5. human rights must be protected;
6. means must be provided to resolve disputes without excessive cost or delay;
7. trials must be fair and
8. the duty of the state to comply with its obligations under international and national law.⁴¹

34 Ibid.

35 Ibid., p. 51.

36 Ibid., p. 52.

37 Ibid., p. 57.

38 VC, 2011.

39 Craig, 2019, pp. 156–187.

40 Lauc, 2016, p. 57.

41 Ibid.

In recent times, the concept of the rule of law has become increasingly vital as our societies face various challenges and undergo several transformations. From technological advancements to geopolitical shifts, from global pandemics to socioeconomic inequalities, the rule of law plays a critical role in navigating complex and ever-changing landscapes.⁴² Therefore, Varga raised a pertinent question on the relevance of values regarding the rule of law established decades or even centuries ago in today's context.⁴³ He pondered over how our current framework of the rule of law can effectively address the challenges posed by modern dynamics.⁴⁴ The classical system of checks and balances, developed nearly two centuries ago, struggles to function and operate efficiently in response to the influence of various factors.⁴⁵ As Varga noted, these factors include the power wielded by print and electronic media, the pressure exerted by large organisations, the financial coercion facilitated by international agents of globalisation and organised crime, which often operate with state support.⁴⁶ These entities assert themselves with increasing arrogance, without assuming responsibility, in a domain that is largely devoid of regulations, but enabled by global economic trends and advanced technologies.⁴⁷ The traditional regime of the rule of law fails to offer suitable regulations or solutions to effectively manage the encroachment of these new powers, which significantly influence our future.⁴⁸

The 2023 EU Rule of Law Report, follows the pattern of previous years by addressing significant common themes, trends, challenges, and positive developments,⁴⁹ and includes specific recommendations to Member States and provides updates on the progress made in implementing the recommendations issued last year.⁵⁰ These recommendations are structured into four key pillars: (a) Justice systems in the Member States, (b) Anti-corruption frameworks, (c) Media freedom and pluralism, and (d) Institutional issues related to checks and balances.⁵¹ Therefore, these four pillars are cornerstones for monitoring the rule of law in each Member state.

Justice systems hold significant relevance, with a key focus on their independence, quality, and efficiency.⁵² These parameters are vital to uphold the effective application and enforcement of EU law while preserving the integrity of the rule

42 Varga, 2021, pp. 95.

43 Varga, 2021, pp. 95–99.

44 Ibid.

45 Ibid.

46 Varga, 2021, p. 95.

47 Ibid.

48 Ibid.

49 European Commission, 2023a.

50 The report presents examples that reflect these trends, sourced from assessments found in the 27 country chapters, which form an integral part of the report and provide detailed contextual information for each Member State. – European Commission, 2023a, p. 2.

51 Ibid.

52 Ibid.

of law. The presence of well-functioning and fully independent justice systems is essential in ensuring the equitable treatment for citizens and businesses alike.⁵³ These systems play a crucial role in facilitating judicial cooperation within the EU, supporting the smooth functioning of the Single Market, and upholding the overall legal order of the EU.⁵⁴ There are anti-corruption frameworks, with a focus on evaluating the effectiveness of national anti-corruption policies and assessing various key areas of action taken by Member States to prevent and combat corruption.⁵⁵ Effective anti-corruption measures, transparency, and integrity are crucial to strengthening and ensuring the credibility of state power. They play a significant role in fostering trust among citizens and businesses in public authorities.⁵⁶ This is supported by media freedoms and pluralism, which ensure transparency and public awareness as ‘watch dogs.’⁵⁷ Therefore, core aspects such as the independence of media regulatory authorities, transparency and concentration of media ownership, fairness and transparency in the allocation of state advertising, safety of journalists, access to information, and governance of public service media are very important.⁵⁸ These factors are essential for the media to fulfil its role in a healthy democracy and to preserve the rule of law.⁵⁹

The 2023 EU Rule of Law Report considers institutional issues related to checks and balances, focusing on key areas that are crucial for upholding the rule of law.⁶⁰ These include the quality and inclusiveness of the national legislative process, the role of Constitutional Courts, and independent authorities like the Ombudsperson, equality bodies, and national human rights institutions. The Report examines the role of civil society organisations in safeguarding the rule of law.⁶¹

2. The rule of law in Croatia

The rule of law is the cornerstone of modern legal systems, providing the framework for a just and orderly society. It encompasses principles such as equality before law, legal certainty, accountability, and access to justice.

According to the EU 2023 Rule of Law Report, Croatia and Poland have a considerably low level of perceived independence, falling below 30%, while Finland, Denmark, Austria, Germany, and Luxembourg exhibit a notably high

53 Ibid.

54 Ibid.

55 Ibid.

56 Ibid.

57 Ibid.

58 Ibid.

59 Ibid.

60 Ibid.

61 Ibid.

perceived level of independence among the general public, exceeding 75%.⁶² Some reservations must be made towards such data, as even the authors of the Report in the relevant methodology section of this publication advise using such findings critically, noting that ‘while perception indicators and surveys remain a useful source of information, they are to be interpreted with caution and within the relevant context.’⁶³

Efforts are underway in Croatia, as acknowledged by the Rule of Law Report, to address concerns regarding the remuneration of judges, state prosecutors, and judicial staff, while simultaneously making advancements in expanding electronic communication tools and reducing backlogs within the justice system.⁶⁴ However, significant hurdles related to efficiency and quality persist, as reflected in the general increase in trial durations. Consequently, Croatia recently witnessed an almost eight-week-long strike within the judiciary, which has recently ended. This labour action has undoubtedly contributed to an increase in the duration of Court proceedings.⁶⁵ Croatia has witnessed an increased adoption of electronic communication systems, integrating most remaining courts into a unified system that is already utilised by all other courts.⁶⁶ Thus, the prolonged duration of proceedings for investigating, prosecuting, and adjudicating corruption offences continues to undermine the effectiveness of the anti-corruption system.⁶⁷ Legislation to address this issue has not yet been introduced.⁶⁸ Nonetheless, there have been effective investigations of high-level corruption, leading to an overall rise in the number of indictments and judgements.⁶⁹

The adoption of Codes of Conduct for Members of Parliament in Croatia, accompanied by the substantial compliance of nearly all local and regional administrations, showcases a commitment to ethical standards.⁷⁰ Ongoing discussions on new lobbying legislation are taking place in Belgium, Czechia, Croatia, Spain, Ireland, and Portugal, demonstrating a collective effort to enhance transparency and accountability.⁷¹ In Croatia, no further measures have been taken since the last legislative reform in 2021 to strengthen the framework for the public tender procedure concerning state advertising in local and regional media.⁷² The Media

62 European Commission, 2023, p. 4.

63 Euroean Commission, 2023b, European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report [Online]. Available at: https://commission.europa.eu/system/files/2023-07/63_1_52674_rol_methodology_en.pdf, p. 1 (Accessed: 04 September 2023).

64 *Ibid.*, p. 9.

65 Lukić, 2023.

66 European Commission, 2023a, p. 2.

67 *Ibid.*

68 *Ibid.*, p. 13.

69 *Ibid.*

70 *Ibid.*, p. 14.

71 *Ibid.*, p. 15.

72 *Ibid.*, p. 20.

Pluralism Monitor underscores the significance of media pluralism, showing that it is classified as ‘high risk’ and ‘very high risk’ in five (Croatia, Cyprus, Greece, Slovenia, and Malta) and four (Bulgaria, Poland, Romania, and Hungary) Member States, respectively.⁷³ Although revisions have been made to the law on general access to information and public documents in Croatia, delays in implementation persist in certain cases.⁷⁴ Whereas progress has been made in addressing the recommendations of the People’s Ombudsperson in Croatia, challenges remain in ensuring unfettered access to information.⁷⁵

After the adoption of the 2022 Rule of Law Report, the Commission, in collaboration with the Fundamental Rights Agency and national stakeholders, initiated the inaugural ‘national rule of law dialogues’ in Belgium, Germany, and Croatia.⁷⁶ These dialogues serve as crucial platforms for constructive engagement and the exchange of ideas.⁷⁷ Consequently, in Croatia, as a response to recommendations from the previous year, the Constitutional Court decision eliminated periodic security checks on judges, and similar removals are expected for state attorneys through upcoming amendments.⁷⁸

■ 2.1. *Examining the rule of law and the Croatian Constitution: Insights from the Constitutional Court*

The Constitution of the Republic of Croatia⁷⁹ plays a significant role in upholding the rule of law, which is regulated through (substantive and procedural) Criminal Law. Article 3 establishes the highest values of the constitutional order, including the rule of law, the values of which form the basis for interpreting the Constitution and laws and other regulations. Thus, in Article 5, the Constitution stipulates the principle of constitutionality and legality,⁸⁰ which was mentioned at the beginning of the paper. Everyone is obliged to adhere to the Constitution and the law and respect the legal order of the Republic of Croatia.⁸¹

The principle of constitutionality and legality⁸² is a formal hierarchy and requires the democratic content of a political system that protects human rights and fundamental freedoms in the relations between citizens and public authorities.⁸³ According to Lautenbach, acting in accordance with the law is an essential

73 Ibid., p. 19.

74 Ibid., p. 21.

75 Ibid., p. 25.

76 Ibid., p. 29.

77 European Commission, 2023a, p. 29.

78 European Commission, 2023a, p. 8.

79 Constitution of the Republic of Croatia, OG, 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

80 Art. 5(1) of the Constitution.

81 Art. 5(1) of the Constitution.

82 Art. 31 of the Constitution.

83 Lauc, 2016, p. 60.

aspect of legality, and establishes certain standards that laws must be met, including generality and clarity.⁸⁴ Consequently, legality encompasses the law and serves as a fundamental principle of the rule of law and modern governance.⁸⁵ It ensures the protection of individuals' rights against arbitrary intervention by the state, thus guaranteeing their security.⁸⁶ Lautenbach highlighted that legality supports individual autonomy by enabling people to make plans for their lives.⁸⁷

By defining the highest values of the constitutional order, which are used to interpret the Constitution,⁸⁸ the possibility of abandoning grammatical interpretation in the process of the 'judicialisation of political decision-making' is opened via teleological interpretation. This means activating the activist role of the constitutional judiciary.⁸⁹ Lauc reiterated that the Constitutional Court of the Republic of Croatia increasingly takes on an activist role, in creatively interpreting the Constitution, especially the highest values of the constitutional order and providing teleological interpretations.⁹⁰ The Constitutional Court has repeatedly defined the principle of constitutionality and legality. In its decision, it stated that the rule of law

presupposes full constitutionality and legality in the sense of Article 5 of the Constitution, it is more than just the requirement to act in accordance with the law: it also includes requirements concerning the content of the law. Therefore, the rule of law in itself cannot be law in the same sense as the laws enacted by the legislator. The rule of law is not only the rule of law but the rule by law, which – in addition to the requirement for constitutionality and legality, as the most important principle of any regulated legal order – contains additional requirements concerning the laws themselves and their content.⁹¹

The Court pointed out that laws must be general and equal for everyone in a legal order based on the rule of law.⁹² Legal consequences must be certain for those to whom the law will be applied,⁹³ and must be suited to the legitimate expectations of

84 Lautenbach, 2013, pp. 18–69.

85 Ibid.

86 Ibid.

87 Ibid.

88 Art. 3 of the Constitution.

89 Lauc, 2016, p. 60.

90 Ibid.

91 Decision and Ruling of the Constitutional Court of the Republic of Croatia number: U-I-659/1994, U-I-146/1996, U-I-228/1996, U-I-508/1996, U-I-589/1999 of 15 March 2000., para. 11, OG, 31/2000 [Online]. Available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2000_03_31_659.html (Accessed: 10 May 2023).

92 Constitutional Court Decision and Ruling, U-I-659/1994, U-I-146/1996, U-I-228/1996, U-I-508/1996, U-I-589/1999, para. 11.1.

93 Ibid.

the parties in each case to which the law applies.⁹⁴ As one of the main pillars of the rule of law, the Court has emphasised the principle of separation of powers under Article 4 of the Constitution.⁹⁵ It is one of those rules for the organisation of state power that are useful insofar as it serves and defends the rule of law.⁹⁶ It is one of the most important elements of the rule of law because it prevents the possibility of concentration of authority and political power in (only) one body.⁹⁷ The Court has pointed out that the separation of the three powers should not be interpreted mechanically because they are all state authorities that are functionally intertwined and mutually imbued with a multitude of the most diverse relationships and mutual influences, with the predominant goal of mutual supervision.⁹⁸

The Report presented to the Croatian Parliament on the Legal Force, Nature, and Effects of Constitutional Laws for the Implementation of the Constitution of the Republic of Croatia highlighted certain key points. In line with the principle of the rule of law, which represents the fundamental basis for interpreting the Constitution,⁹⁹ the Constitutional Court deems it necessary to communicate to the Croatian Parliament the clear requirements that arise concerning future practices related to the adoption of constitutional laws for implementing the Constitution.¹⁰⁰ To uphold the principle of legal certainty within the objective constitutional order of the Republic of Croatia, it is imperative to establish clear and precise regulations regarding the legal force, nature, and effects of constitutional laws for implementing the Constitution in future amendment procedures. The demands for legal consistency and principles derived from the rule of law, particularly legal certainty and the certainty of an objective legal order, emphasise the need to align the current legislative practices related to constitutional laws for implementing the Constitution with constitutionally acceptable standards. It is essential to standardise these practices uniformly in all future cases.¹⁰¹

Lauc noted that one of the fundamental requirements that must be met for a law to be declared in accordance with the principle of the rule of law is certainty vis-à-vis everyone to whom the law should be applied.¹⁰² This principle will be respected only if the legal provisions are going to be precise enough to those, to whom they refer, in terms of their rights and obligations.¹⁰³ Lauc noted that according to the Constitutional Court, the principle of the rule of law consumes

94 Ibid.

95 Ibid., para. 12.

96 Ibid.

97 Ibid.

98 Ibid.

99 Art. 3 of the Constitutions.

100 Lauc, 2016, pp. 62–63.

101 Ibid., pp. 62–63.

102 Ibid., p. 61.

103 Ibid.

the principle of proportionality, that is, fairness.¹⁰⁴ The Croatian Constitutional Court had constitutionalised this principle stating that any restriction (even when necessary and based on the Constitution) represents an exceptional situation because it deviates from the general rules on constitutional freedoms and rights.¹⁰⁵ This rule on the proportionality of restrictions to the goal and purpose that the law seeks to achieve is a general constitutional principle immanent in all constitutional provisions on freedoms and rights.¹⁰⁶

The Constitutional Court emphasises that the strict requirements of the rule of law and legal certainty naturally apply to the transitional and final provisions of law. These provisions reflect the legislature's commitment to protecting constitutional assets and upholding constitutional guarantees, demonstrating the credibility of the objective legal order itself.¹⁰⁷ The Constitutional Court addressed the Parliament through the Report to the Croatian Parliament on constitutionally unacceptable effects of the revised texts of the Constitution of the Republic of Croatia, constitutional laws, laws, other regulations, and general acts,¹⁰⁸ and stated that amended law must not encroach on the systematics of the legal text and numbering of articles. It must enter into force on a specified day.¹⁰⁹ Only such amendments align with the principle of the rule of law, especially the principle of the legal security of objective law.¹¹⁰

Lauc explained the significant influence and primary role of the Constitutional Court in upholding constitutionality and legality.¹¹¹ For example, in the Report on the Legislative Practice of Consecutive Multi-year Derogation of Recognised Rights, it is firmly stated that such a practice is unacceptable in a democratic state governed by the rule of law.¹¹²

The Constitutional Court highlights that evaluating the conformity of a legal norm with the rule of law goes beyond considering its potential consequences. Instead, it primarily focuses on what a legal norm of transitional or final nature must be in a democratic society founded on the rule of law. This assessment

104 Ibid.

105 Ibid.

106 With the constitutional changes of 2000, this principle was included in Art. 16(2) of the Constitution of the Republic of Croatia, Lauc, 2016, p. 61.

107 Lauc, 2016, p. 62.

108 The Report to the Croatian Parliament on constitutionally unacceptable effects of the revised texts of the Constitution of the Republic of Croatia, Constitutional laws, laws, other regulations and general acts U-X-80/2005, OG, 37/2011 [Online]. Available at: <https://www.iusinfo.hr/zakonodavstvo/izvjesce-o-ustavnopravno-neprihvatljivim-ucincima-prociscenih-tekstova-ustava-republike-hrvatske-ustavnih-zakon-zakona-drugih-propisani-opcih-akata-1/clanak-1> (Accessed: 10 May 2023).

109 Lauc, 2016, p. 63.

110 The Report to the Croatian Parliament on constitutionally unacceptable effects of the revised texts of the Constitution of the Republic of Croatia, Constitutional laws, laws, other regulations and general acts U-X-80/2005, para. 9.

111 Lauc, 2016, p. 62.

112 Lauc, 2016, p. 62.

considers the requirements of precision, certainty, predictability, and accessibility, aiming to realise the principles of legal security and certainty, and the protection of constitutional values. The legal framework of a constitutional state should not be equated with mere oversight, omission, or clumsiness on part of the drafters, government, or Parliament, but rather serve as a crucial element to be meticulously crafted and respected.¹¹³

The Constitution contains many principles concerning Criminal Law, and only the most important one will be mentioned, namely the principles of legality¹¹⁴ and legal certainty, which are fundamental aspects of the rule of law, and emphasise the importance of clear and predictable laws and procedures. In Criminal Law, the principle of legal certainty, specifically its principle of legality, requires that all aspects related to criminal offences be clearly defined and made accessible to everyone. This principle (of legality) ensures that individuals can understand the boundaries of lawful behaviour and have confidence in the justice system's predictability and consistency. Therefore, criminal offences are regulated by law, and most of them are regulated by the Penal Code (PC),¹¹⁵ whereas procedural matters and aspects of crime, such as investigating, prosecuting, and adjudicating criminal cases, are regulated by the Criminal Procedure Act (CPA),¹¹⁶ thus ensuring that individuals accused of crimes are treated fairly throughout the legal process.¹¹⁷

■ 2.2. *The rule of law and Criminal Law in Croatia*

This chapter explores the crucial relationship between the rule of law and Criminal Law in Croatia, focusing on the interplay of these concepts in safeguarding individual rights, maintaining social order, and ensuring that justice is served.

Criminal law and the Penal Code serve as a check on the power of the state. It establishes clear boundaries for state action, defining the conduct that is considered criminal and specifying the conditions under which the state can interfere with individuals' rights and liberties. It ensures that state authorities are subject to legal constraints and held accountable for their actions. It protects individuals from the arbitrary exercise of power and guards against abuses by ensuring that state interventions are lawful, justified, and proportional. The principle of legality guarantees this.¹¹⁸ Criminal law plays a vital role in maintaining social order

113 Ibid.

114 Art. 31 of the Constitution.

115 Penal Code, OG, 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22.

116 Criminal Procedure Act, OG, 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 130/20, 80/22.

117 These rights include the rights to a prompt and public trial, be informed of the charges, confront witnesses, present evidence, and legal representation, etc. By upholding these rights, criminal law offers safeguards against arbitrary arrest, wrongful conviction, and other miscarriages of justice.

118 VC, 2011, p. 10, para. 44.

by defining and prohibiting behaviour that threatens individuals and society.¹¹⁹ It establishes a rule system that delineates acceptable conduct and provides a deterrent effect against potential offenders. By defining criminal offences clearly and prescribing penalties, Criminal Law contributes to the prevention of crime, protection of public safety, and preservation of social cohesion.

Lautenbach highlighted that the European Court of Human Rights (ECtHR) aims to interpret the principle of legality consistently across various articles of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights or ECHR or the Convention).¹²⁰ Article 7 (No punishment without law) of the Convention emphasises that domestic laws must be accessible and foreseeable.¹²¹ The requirement of foreseeability includes the principle of non-retroactivity, ensuring that individuals cannot be punished for actions that were not considered illegal when they were committed.¹²² The interpretation of Article 7 aligns with the concept of accessibility and foreseeability, as these principles also apply to other articles of the Convention.¹²³ The strictness of the review of non-retroactivity varies based on the area of the law and individuals affected by it.¹²⁴ The text discusses two instances that illustrate how non-retroactivity is interpreted in light of foreseeability vis-à-vis Article 7, revealing that non-retroactivity is not as stringent as one may expect in this vital safeguard within Criminal Law.¹²⁵ The right not to be punished without a previously enacted law establishes particular requirements that national laws must adhere to.¹²⁶ These requirements of foreseeability align with the significant role of Article 7 in upholding the rule of law. The ECtHR considers the principle of *nulla poena* (no punishment without law) one of the fundamental principles of the rule of law.¹²⁷

Under the rule of law, all individuals, regardless of their status, are entitled to equal treatment, that is equality, before the law. In the realm of Criminal Law, this principle ensures that no one is above the law and that individuals are held accountable for their actions based on the same legal standards. It prohibits discrimination and guarantees that the legal system treats everyone fairly, without bias or favouritism. The rule of law necessitates that individuals have access to justice, that is, access to justice in Criminal Law or the right to a fair trial (in

119 For more about principle of legality see: Horvatić, Derenčinović and Cvitanović, 2016, pp. 126–133; Novoselec, 2016, pp. 47–63.

120 The Convention for the Protection of Human Rights and Fundamental Freedoms (1950) [Online]. Available at: https://www.echr.coe.int/documents/d/echr/Convention_ENG (Accessed: 15 July 2023).

121 Lautenbach, 2013, p. 106.

122 Ibid.

123 Ibid.

124 Ibid.

125 Ibid.

126 Ibid.

127 Ibid.

procedural Criminal Law),¹²⁸ ensuring that they can seek redress and protection of their rights through a functioning legal system. It guarantees that victims, witnesses, and the accused have rights (of a substantive and procedural nature) and can participate effectively in the legal process.¹²⁹ The rule of law makes it mandatory for the state to provide mechanisms for individuals to seek remedies and challenge violations of their rights in the criminal justice system. Thus, one fundamental principle of Criminal Law, which the Constitution also proclaims, is the presumption of innocence,¹³⁰ regulated in greater detail by CPA. It asserts that individuals are considered innocent until proven guilty. This principle safeguards the rights of the accused by placing the burden of proof on the prosecution, requiring them to establish guilt beyond all reasonable doubt. The presumption of innocence ensures that individuals are not unjustly deprived of their liberty or stigmatised by mere accusations.

Accountability is a crucial component of the rule of law and Criminal Law. The rule of law demands that those who violate the law, including those accused of committing criminal offences, be held accountable for their actions.¹³¹ Criminal law provides the legal framework through the Penal Code for defining offences and establishing penalties for those who commit them. A transparent and fair criminal justice system achieves accountability by conducting impartial investigations, fair trials, and appropriate sentencing.

Criminal law seeks to ensure that the punishment for offences is proportional to the severity of the crime. According to the principle of proportionality,¹³² penalties should neither be too lenient nor excessively harsh. This ensures that the punishment fits the offence and prevents arbitrary or unjust sentencing. By adhering to the principle of proportionality, Criminal Law seeks to achieve a fair balance between the rights of the accused and the interests of society.

3. Case Study on the Breach of the rule of law by Tackling War Profiteering and Privatisation

The principle of legality is important in substantive Criminal Law. Among its various components or subprinciples is the prohibition of retroactivity. This principle has an exception known as the Principle of *Lex Mitior*.¹³³ The ECtHR has established that foreseeability encompasses the principle of *lex mitior*, regarding

128 Art. 29 of the Constitution.

129 For more about the rights of victims in criminal law see Bezić and Šprem, 2020, pp. 603–635; Stipišić, 2018, pp. 547–574; Ivičević Karas, Burić and Filipović, 2019, pp. 468–489; Drožđan-Kranjčec, 2022.

130 Art. 28 of the Constitution.

131 Art. 20 of the Constitution.

132 Art. 67 of the Penal Code.

133 Art. 3(2) of the Penal Code.

Article 7 and non-retroactivity carries specific meaning. In *Scoppola v Italy*,¹³⁴ the Court recognised a legal development towards a European and international consensus that a more lenient penalty be applied even if it was enacted after the commission of the offence. The ECtHR referred to the Charter of Fundamental Rights of the European Union and the Statute of the International Criminal Tribunal for the former Yugoslavia.¹³⁵ Consequently, it confirmed that *lex mitior* aligns with the rule of law.¹³⁶ Therefore, in criminal cases, domestic courts must retroactively apply newly enacted laws if they benefit the accused.¹³⁷

The Croatian Parliament expressed its intention (in 2010) to pass a special law aimed at recovering the funds and money that were deemed “lost” during the transition and privatisation process in Croatia. Consequently, an amendment to the Croatian Constitution was necessary. Article 31 of the Constitution, which deals with the Statute of Limitations and the principle of legality was amended.

In 2010, an Amendment to the Constitution introduced a new provision, paragraph 4, under Article 31 (principle of legality).¹³⁸ This addition states that criminal offences related to war profiteering and arising from the process of ownership transformation and privatisation, committed during the Homeland War and peaceful reintegration, war circumstances, and immediate threats to the independence and territorial integrity of the state, will not be subject to the Statute of Limitations. Any financial gain or property benefit (pecuniary advantage) obtained through these acts or associated with them will be subject to confiscation.¹³⁹

After the constitutional amendment, the Law on Exemption from the Statute of Limitations for War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatisation was enacted in 2011 (Law on Exemption).¹⁴⁰ In 2011, the Law on Exemption, accompanied by a new Penal Code¹⁴¹ and certain provisions thereof, played a crucial role in providing comprehensive clarifications and enabling the practical application of the recently amended constitutional provision.¹⁴² The Law on Exemption outlined and identified specific criminal offences that are exempt from the Statute of Limitations.¹⁴³

134 *Scoppola v Italy* (Application no. 10249/03), Judgment, 17 September 2009, paras. 105–108.

135 Lautehbach, 2013, p. 106.

136 Ibid.

137 Ibid.

138 Art. 5 of the Decision on the proclamation of changes to the Constitution of the Republic of Croatia OG, 76/2010; Novoselec and Novosel, 2011, pp. 603–619.

139 Novoselec, 2015, p. 437.

140 The Law on Exemption from the Statute of Limitations for War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatization, OG, 57/11.

141 Roksandić Vidlička, 2017, pp. 116–117.

142 Art. 31(4) of the Penal Code.

143 Novoselec, 2015, p. 437.

The 2004 Croatian State Audit Report¹⁴⁴ played a significant role in bringing the entire issue of transformation and privatisation into the spotlight. Following its publication, attempts were made to tackle the challenges associated with transformation and privatisation through legal measures. However, in terms of Criminal Law, the Report held limited relevance in numerous cases owing to the Statute of Limitations that had either already expired or was nearing expiry for the crimes committed during the transformation and privatisation process. This sentiment was echoed in the Transformation and Privatisation Revision Report.¹⁴⁵

Acknowledging the aforementioned legal barrier, the importance of a criminal policy response was still acknowledged owing to the constitutional pursuit of social justice in Croatia and the imperative to address the irregularities exposed in the Report.¹⁴⁶ Thus, constitutional amendments were introduced in 2010 to enable the retrospective prosecution of all transitional economic crimes. These amendments sought to emphasise that the expected economic gains from transformation and privatisation had not been realised and had failed to substantially contribute to Croatia's economic development.¹⁴⁷

The Decision Proposal to Amend the Constitution of Croatia¹⁴⁸ highlighted the adverse effects stemming from the process of transformation and privatisation. These effects included a rise in domestic and foreign debt, a substantial increase in unemployment, the disproportionate enrichment of certain individuals, and unjust impoverishment of many. It resulted in a decrease in real wages and pensions in relation to the cost of living, among other consequences.¹⁴⁹ In light of these circumstances, the proponents of the idea emphasised that while the Statute of Limitations is designed to uphold legal certainty for citizens, it should not enable perpetrators to legitimise the repercussions of their actions.¹⁵⁰

While the constitutional amendment sought to prevent perpetrators from exploiting the Statute of Limitations, the Law on Exemption has limited applicability, covering only specific cases.¹⁵¹ This law addresses crimes related to privatisation and ownership transformation that occurred during the Homeland War, peaceful reintegration, warfare, and direct threats to the independence and territorial integrity of the state. Consequently, not all instances of privatisation and

144 Roksandić Vidlička, 2017, p. 115; Josipović, 2018, pp. 197–259.

145 Novoselec, Roksandić Vidlička and Maršavelski, 2015, pp. 198–217.

146 Final State Audit Office Report on Revision of Ownership Transformation and Privatization 2004, p. 41.

147 Roksandić Vidlička, 2017, p. 115; see also Roksandić Vidlička, 2019, pp. 436–473; see also Roksandić Vidlička, 2014, pp. 1091–1119.

148 Decision Proposal to Amend the Constitution of Croatia 2009, p. 8 [Online]. Available at: <https://www.sabor.hr/sites/default/files/uploads/sabor/2019-01-18/080001/PROMJENA%20USTAVA%20RH.pdf> (Accessed: 15 May 2023).

149 Novoselec, 2015, pp. 437–451.

150 Decision Proposal to Amend the Constitution of Croatia 2009, p. 8.

151 Roksandić Vidlička, 2017, pp. 116–117.

ownership transformation crimes are encompassed by this law.¹⁵² Approximately 10 cases have been brought to trial by applying the Law on Exemption, attracting significant media attention. Doubts have been raised in relation to the number of crimes and cases that should have been addressed under the Law on Exemption.¹⁵³ Roksandić Vidlička suggested that there could be over 61 cases awaiting prosecution based on available information. The Law on Exemption from the Statute of Limitations could potentially apply to 116 cases currently under investigation or in criminal proceedings.¹⁵⁴ These findings raise concerns as they contradict the stated purpose of amending the Constitution to prevent perpetrators from taking advantage of the Statute of Limitations.¹⁵⁵

Prosecutors have faced significant challenges in implementing a constitutional amendment pertaining to war profiteering crimes, especially concerning the principle of legal certainty.¹⁵⁶ Prosecuting these crimes presents difficulties owing to the passage of time, lack of reliable witnesses, defunct companies, destroyed financial records, and hurdles in gathering evidence. The introduction of retroactive amendments creates uncertainties in the legal framework, whereas financial accounting regulations establish specific timeframes for retaining accounting documents and financial reports.¹⁵⁷ The prosecution of transitional economic offences that took place over two decades ago involves legal obstacles, political opposition, and the potential for manipulation in prosecutorial selectivity.¹⁵⁸ Nonetheless, there have been instances where the Law on Exemption has been applied in prosecuting such cases.¹⁵⁹

The prosecution's focus primarily revolved around former Croatian Prime Minister IS, who faced charges related to the abuse of his position rather than being directly linked to war profiteering or privatisation offences.¹⁶⁰ This case involved IS' indictment in 2011 for his involvement in a loan negotiation with Austrian bank Hypo Alpe-Adria-Bank International AG. While serving as the Croatian Deputy Minister of Foreign Affairs, IS reached an agreement with the bank to receive a commission of 7 million Austrian Schillings in exchange for facilitating their entry into the Croatian market. He was charged with war profiteering and abuse of office. The application of the Law on Exemption from the Statute of Limitations was relevant in this case as IS had exploited his position to gain illicit property during a challenging period in the country marked by high inflation

152 Ibid.

153 Ibid.

154 Ibid.

155 Ibid.

156 Ibid., p. 116.

157 Ibid.

158 Ibid.

159 Ibid.

160 Ibid., pp. 116–117.

and interest rates.¹⁶¹ In September 2011, IS faced separate charges for allegedly accepting a €10 million bribe during his tenure as the Prime Minister of Croatia.¹⁶² The bribe was purportedly received from ZH, the chairman of the management board of Hungarian oil company MOL, in exchange for granting control over the Croatian oil company INA to MOL.¹⁶³ The indictment asserted that the deal was made in 2008, with the bribe being offered in return for taking action to amend the Shareholder's Agreement. Both sets of charges were consolidated into a single trial, and the verdict was delivered on 20 November 2012. IS was found guilty of abusing his position for personal gain rather than serving the country's best interests. The judgement delivered a strong message on the significance of public office being carried out for the benefit of society, highlighting the detrimental impact of IS' actions on Croatia's reputation.¹⁶⁴ Consequently, he was sentenced to eight-and-a-half years of imprisonment (2014).¹⁶⁵ The verdict in this case was challenged before the Constitutional Court of the Republic of Croatia, and the Court overturned the initial ruling (2015).¹⁶⁶ The primary reason for this decision was the courts' inability to provide justification for the application of the relevant Penal Code and the Law on Exemption.¹⁶⁷ The courts failed to assess whether the Statute of Limitations for the underlying criminal offence had expired and to determine the proper application of the Law on Exemption in such circumstances.¹⁶⁸ The Constitutional Court pointed out that the lower courts failed to determine whether the supplementary elements outlined in Article 7(1) of the Law on Exemption were applicable to the specific case.¹⁶⁹ The Constitutional Court had a significant role in interpreting the Constitution, especially Article 31(4), and in overturning this case. The case concluded recently. The former Croatian Prime Minister was found not guilty in the Hypo case (not final at the time of writing), but received a prison sentence of six years for the INA-Mol affair (one of the cases elaborated upon previously). Having faced multiple proceedings over the course of the past 13 years (with a total of 5 cases, 3 of which resulted in guilty verdicts and reached their final decisions), it became necessary to consolidate sentences from all conclusive judgements. The consolidated sentence was 18 years of imprisonment. He was obligated to reimburse HRK 34 million (equivalent to approximately EUR 4.5 million).¹⁷⁰

161 Ibid., p. 117.

162 Ibid., p. 118.

163 Ibid.

164 Ibid.

165 Croatia Supreme Court decision, Kž- Us 94/13, 3 April 2014.

166 Constitutional Court Decision, U-III-4149/2014 of 24 July 2015.

167 For more see Derenčinović, 2015, pp. 7–14. For the “dissenting opinion”, a different, standpoint see the argumentation in Đurđević, 2018, pp. 261–302.

168 Constitutional Court Decision, U-III-4149/2014 of 24 July 2015, pp. 34–43.

169 Ibid.

170 Jakelić, 2023; Dešković, 2023 and finally *Visoki kazneni sud smanjio S. kaznu za osam mjeseci*.

Roksandić Vidlička considered this Law on Exemption a legal instrument that reflects Criminal Law cases involving transitional justice. However, she stated that the use of retroactive Criminal Law in cases of transitional justice, which involves addressing human rights violations and establishing accountability during periods of conflict or repression, raises concerns regarding the rule of law.¹⁷¹ Thus, the retroactive application of Criminal Law is considered the “law of last resort” and should be used sparingly when other means of addressing the issue have proven inadequate.¹⁷² One main concern is the potential for injustice resulting from prosecutorial selectivity. Prosecutors have discretionary power to choose the cases they want to pursue and individuals they want to prosecute. In transitional justice contexts, this selectivity can be influenced by political factors, biases, and/or limited resources, leading to an uneven application of justice. This approach undermines fairness, equality, and the rule of law, which are crucial for building a just and stable society.¹⁷³

According to Lautenbach, the ECtHR has recognised that the right not to be punished without a previously enacted law includes considering statutory limitation periods.¹⁷⁴ In *Kononov v. Latvia*, the ECtHR assessed whether domestic law could serve as a valid legal basis for a conviction.¹⁷⁵ It concluded that the statutory limitation periods had definitively expired.¹⁷⁶ It observed that limitation periods exist to ensure legal certainty.¹⁷⁷ Therefore, punishing the applicant nearly half a century after the expiry of a limitation period goes against the principle of foreseeability.¹⁷⁸ Previous ECtHR judgements have emphasised that foreseeability entails that punishment should not exceed the boundaries set by the legal provision that renders the act punishable. The Court has stressed the importance of adhering to limitation periods as they contribute to legal certainty.¹⁷⁹

Cvitanović, Derenčinović, and Dragičević Prtenjača¹⁸⁰ have emphasised how efforts to address the ‘transitional injustices’ stemming from war profiteering and criminal acts in the process of conversion and privatisation through constitutional amendments in 2010 and the Law on Exemption have proven to be entirely unsuccessful.¹⁸¹ These attempts have caused significant harm, the full extent of which may only become apparent over time. The retroactive prosecution of criminal offences from the conversion and privatisation process and war profiteering,

171 Roksandić Vidlička, 2017, p. 6.

172 Ibid.

173 Ibid.

174 Lautenbach, 2013, p. 106.

175 *Kononov v. Latvia* (Application no. 36376/04), Judgment, 17 May 2010, paras. 142–146.

176 Ibid.

177 Lautenbach, 2013, p. 106.

178 Ibid.

179 Ibid.

180 Cvitanović, Derenčinović and Dragičević Prtenjača, 2019, p. 481.

181 Ibid.

which occurred approximately 21 to 29 years ago and fall outside the Statute of Limitations, has violated a fundamental principle of substantive Criminal Law, namely the principle of legality.¹⁸² This violation encompasses the prohibition of retroactivity related to extended statutes of limitations and the temporal nature of the Law on Exemption and the principles of legality and legal certainty.¹⁸³ The principle of legality is a cornerstone in Criminal Law and a fundamental aspect of upholding the rule of law and safeguarding human rights.¹⁸⁴ International bodies, such as the ECtHR, consider the principle of legality a non-derogable right. By introducing the concept of non-statute barred criminal offences of war profiteering into Croatian Criminal Law, the violation of this principle has called into question the principles of legality and legal certainty based on the rule of law, and has created uncertainty owing to the vague and ambiguous nature of the implementing legislation (Law on Exemption), which fails to adhere to the principle of *lex certa*.

The principle of legality protects against arbitrary actions by competent authorities, including legislators as lawmakers and the judiciary, including courts and the state attorney's office as enforcers. It serves as a foundation for the actions of these bodies in implementing and applying substantive Criminal Law. Several other important constitutional principles, such as equality and justice, have been disregarded, leading to negative consequences for the state of criminal justice, particularly in terms of the public's perception of the judiciary's effectiveness.¹⁸⁵

Roksandić Vidlička noted that transitional justice processes involve various mechanisms beyond criminal prosecution, such as truth commissions, reparations programmes, and institutional reforms.¹⁸⁶ She explained that these approaches aim to address the broader societal impact of past human rights abuses while balancing the need for justice and reconciliation. Relying solely on criminal prosecution may neglect these important aspects of transitional justice.¹⁸⁷ Considering the complexities of each unique transitional context, a comprehensive approach is needed to balance justice, accountability, and the rule of law while avoiding further injustices.¹⁸⁸ Despite the legal changes, the number of prosecutions and scope of the law's applicability suggest ongoing challenges in addressing war profiteering and privatisation offences committed during specified periods.

Hungary had a similar case. However, in 1993, the Constitutional Court of Hungary declared a law that aimed to retroactively exempt criminal offences committed during communist rule from the Statute of Limitations unconstitutional.¹⁸⁹

182 Ibid.

183 Ibid.

184 Ibid.

185 Ibid.

186 Roksandić Vidlička, 2017, p. 6.

187 Ibid.

188 Ibid.

189 VC, 2009, para. 16.

The Court's rationale was based on the violation of the principle of legality, which is safeguarded by the Hungarian Constitution. It determined that retroactively abolishing the Statute of Limitations after it had already begun is inconsistent with this principle.¹⁹⁰ However, the Court identified two exceptions to this prohibition: First, if the law in force at the time of the offence explicitly stated that the Statute of Limitations did not apply,¹⁹¹ and second, if the offence constituted a crime against humanity or war crime, the obligations under international treaties would take precedence.¹⁹²

According to the Opinion of the Venice Commission, which was requested by Hungary regarding the fourth amendment to the Hungarian Constitution in 2013, the provision in the constitutional amendment regarding the non-obsolence (concept of non-statute barred offenses or criminal offences which have no statute of limitations) nature of 'inhuman crimes committed against the Hungarian people during the socialist and communist dictatorship' is deemed unacceptable.¹⁹³ The Venice Commission concluded that 'provisions regulating this must at least allow for sufficient flexibility with regard to proportionality, taking into account the individual circumstances of each concrete case'.¹⁹⁴ The Commission expresses concerns that incorporating lustration measures into the Constitution after a significant period since the democratisation process began could potentially prioritise retaliation over democracy.¹⁹⁵ Ochoa and Wistrich noted that 'the prompt enforcement results in greater deterrence'¹⁹⁶ and 'the incremental value of deterrence obtained by the pursuit of old claims is likely to be minimal'.¹⁹⁷ According to them, the core function of the law, especially Criminal Law is to influence behaviour, with a primary focus on deterrence rather than compensation while swift enforcement plays a pivotal role in enhancing deterrence.¹⁹⁸ Immediate punishment is more effective in deterring wrongdoing when compared to delayed consequences, and any delay in imposing penalties provides wrongdoers with the opportunity to commit more offences before facing the deterrent effects of punishment.¹⁹⁹ The pursuit of older claims for the sake of deterrence yields minimal benefits, as the wrongdoer may have reformed or offences that are more recent can be addressed more efficiently and economically.²⁰⁰

190 Ibid.

191 Ibid.

192 Ibid.

193 VC, 2013, paras. 27-29.

194 Ibid., para. 29.

195 Ibid., paras. 27-29.

196 Ochoa and Wistrich, 1997, p. 492.

197 Ibid.

198 Ibid.

199 Ochoa and Wistrich, 1997, p. 492.

200 Ibid.

The application of the Law on Exemption raises important questions regarding the legal nature of the Statute of Limitations and thus forms the crux of the matter. In Croatia, there are varying perspectives on whether the Statute of Limitations is classified as part of substantive or procedural Criminal Law, or if it is mixed, encompassing both elements.²⁰¹ If it is considered substantive Criminal Law or mixed, the principle of legality must be obeyed. However, if it is purely procedural, the principle of legality cannot be applied. At the time of writing, the Statute of Limitations in Croatia was mixed. Following the amendment of the Croatian Constitution, especially the provision that upholds legality vis-à-vis the enactment of the Law on Exemption, and the introduction of the Law on Exemption, which explicitly deals with the Statute of Limitations for specific types of criminal offences, it can be inferred that all pertinent aspects have been duly addressed. Therefore, the principle of legality and its subprinciple, the prohibition of retroactivity, should be applied in this context.

The proponents of this unprecedented solution in contemporary comparative Criminal Law did not consider the fact that ‘correcting’ something that transpired almost 21 to 29 years ago (that is, 20 years until the passing of the Exemption Act) through the delayed administration of justice actually leads to injustice. This reasoning is further supported by the Venice Commission,²⁰² which concluded in the case of lustration in Hungary that delayed implementation of the law and justice, owing to the passage of a significant amount of time, has the opposite effect and violates the principles of fairness²⁰³ and the rule of law.

4. Concluding remarks

The role of the rule of law is important in maintaining a just and orderly society and outlines the principles that are fundamental to the rule of law such as equality before the law, legal certainty, accountability, and access to justice. The Croatian Constitution plays a significant role in upholding the rule of law. Article 3 explicitly establishes the constitutional order’s highest values, including the rule of law. Article 5 stipulates the principle of constitutionality and legality. Article 31 regulates the principle of legality, which requires everyone to adhere to the Constitution and the law and to respect the legal order of the Republic of Croatia. The role of the Constitutional Court in upholding constitutionality and legality in Croatia

201 Dragičević Prtenjača and Vejnović, 2016, pp. 94–141.

202 See also European Commission for Democracy Through Law (Venice Commission) – Report ‘Lustration: the Experience of Hungary’ by Prof. Dr Andras Zs. Varga (Judge at the Constitutional Court of Hungary, Member, Hungary, Strasbourg, 19 November 2015 [Online]. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2015\)026-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2015)026-e) (Accessed: 2 July 2023).

203 Cvitanović, Derenčinović and Dragičević Prtenjača, 2019, p. 481.

is important. The Court plays a significant role in interpreting the Constitution, including the highest values of the constitutional order. It defines the principle of constitutionality and legality and emphasises the importance of the separation of powers as a key element of the rule of law.

The rule of law and Criminal Law are interconnected, mutually reinforcing, and underpin the functioning of a just and democratic society. The rule of law ensures that Criminal Law is applied consistently, fairly, and with respect for individual rights. Criminal law upholds the rule of law by providing the legal framework for holding individuals accountable, safeguarding individual rights, and maintaining social order through various principles. One of the most important principles is the principle of legality, which requires that all aspects related to criminal offences be clearly defined and made accessible to everyone. By adhering to these principles, societies can foster a justice system that respects all individuals' rights and liberties while effectively addressing and preventing criminal behaviour. However, Croatia amended the Constitution to prevent perpetrators from benefiting from criminal offences mainly of an economic nature committed during ownership transformation and privatisation, with the argument that the Statute of Limitations cannot be an obstacle for non-prosecution, thus promoting social justice. Croatia enacted the Law on Exemption in 2011. It offers doubtful solutions that were not previously known to Croatian Criminal Law (which is a part of the continental law system). This Law enables the retroactive prosecution of specific crimes associated with privatisation and ownership transformation, which goes against the principle of legality and the prohibition of the retroactive application of the law. Unlike Hungary, which did not take a similar approach, this law stands out as an exceptional example worldwide, and it can be inferred that it does not align with the principles of the rule of law.

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