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Review article

THE INTERCONNECTION OF THE RULE OF LAW, EUROPEAN CONVENTION ON HUMAN RIGHTS PRINCIPLE OF LEGALITY, AND ARTICLE 7 OF THE ECHR*

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ABSTRACT

This paper will focus on the intricate interplay, the link between the rule of law, the principle of legality in a broader sense, and the principle of legality in a narrower sense (stricto sensu) contained in Article 7 (no punishment without the law, or nullum crimen, nulla poena sine lege) of the European Convention on Human Rights (ECHR), particularly its elements of foreseeability and accessibility. These three pillars collectively shape legal systems, ensuring justice, protecting human rights, and preventing the arbitrary exercise of power. This study's guiding concept and historical anchor is the rule of law and its connection to the principle of legality. Through a legal and historical analysis, the research seeks to define the core principles of the rule of law and trace its historical trajectory. Understanding the historical context illuminates how the rule of law has evolved, leading to the establishment of transparent, fair, and accountable legal systems. The research investigates how the ECtHR interprets and implements the principle of legality, focusing on accessibility and foreseeability, and the place and role of the judicial safeguards in connection to these two elements of legality. The authors seek to comprehend the ECtHR's scope and interpretation of these principles. In addition to legal analysis, the research incorporates a qualitative approach by reviewing relevant ECtHR case law on Article 7 ECHR and assessing its scope and impact. Therefore, the study applies the legal-historical and qualitative statistical methods, focusing on case studies of specific ECtHR cases that are significant in light of legalities in the broader sense and stricto sensu (Article 7).

***Keywords**: Article 7, European Convention on Human Rights (ECHR), ECtHR, principle of legality, rule of law*

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1. THE ROOTS OF THE RULE OF LAW AS THE FOUNDATIONS OF THE PRINCIPLES OF ITS MODERN CONSTRUCT

The Rule of Law is not only a concept that characterizes contemporary society, but is also a construction that gives meaning to its development. Although it is generally thought that the rule of law is a modern-legal concept, with certain reservations, one can also talk about its development from the earlier times. These reservations concern to the understanding of law in the context of social relations of a particular moment of time, so we can also talk about the rule of law in the old, middle and modern ages. Although today the rule of law implies transparency, justice, and equality, which is not applicable to its past understanding, the question of legality, as a value that transcends the ruler's will, has existed since the very beginning. That question cannot be compared to the rights of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (so called *European Convention of Human Rights* - hereafter referred to as the Convention or ECHR)[1] like the right to liberty (art. 5), right to respect for private and family life (art. 8), prohibition of slavery and forced labour (art. 4), prohibition of discrimination (art. 14) or no punishment without law (art. 7), but it makes a thin thread of their content.

It can be said that with the enactment of the first codes (which were a list of previous customs), despite the execution of the ruler's will as divine, and his mission to execute that will, the laws became an object of legislative action (and not just a product of custom). That is when the principle of legality as an idea, was born - in its simplest form, with a long development ahead. That notion meant that a society should be "ruled by law, not men", but with an open question of the meaning "law". It should be taken into account that legal historical determinants can only partially and generally explain the principle of legality in the sense of art. 7 ECHR. Namely, art. 7. (as well as the Convention of which it is a part), is not only the ultimate expression of the principle of the rule of law in the development of a democratic society, but it also determines the scope of the European Court of Human Rights' (ECtHR) action in the proactive role of protecting democracy through the legal supervision and protection of human rights[2].

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1 *The European Convention for the Protection of Human Rights and Fundamental Freedoms*; [https://www.echr.coe.int/documents/d/echr/convention_ENG], Accessed 19 February 2024.

2 Some schoolars point out that „*belife that Rule of Law should rule is the hardiest to achieve*" and that „*general trust in law must be earned for each generation, again and again, by legal actors living up their legal obligations*". See Tamanaha, Brian, Z., *The History and Elements of the Rule of Law*, Singapore Journal of legal Studies, 2012, pp. 232-247.

The slow emergence of this principle or idea is evident from the historical development of some legal systems, both in the Western tradition and beyond.[3] Even in the codes of theocratic societies, and kingdoms, such as the Babylonian one, it is stated that even the ruler does not act of his own free will, but does so because he was "sent by Marduk to rule over men, to give the protection of the right to the land".[4] Although we are talking about the systems where the will of the ruler is the law (the rule of men), this prologue emphasizes that this rule derived from a higher idea of universal law. Almost 4000 years ago, while submitted to the ruler's will, people emphasized about submission to the universal value built on the notion of equality. But it was a value necessarily related to the development of consciousness and a long-term, even millennial superstructure. Classical Athens (and Greek society as a whole) had already made a significant contribution. By listing customs as laws that apply to all the people of a certain group, a further step was taken. The real shift was made by the construction of the nascent form of a democratic society (appropriate to the level of its historical development). This would not have happened without the Greek philosophers whose perception of social relations in the 5th century BC was rationalized and partially separated from the „world of gods". Investigating social arrangements, their advantages and disadvantages, they also dealt with the question of the nature of law and its importance. Among them stood Aristotle in whose works the Rule of Law took a visible form.[5] He asked himself (Politics, book 3) whether is it better to be ruled by the best leader or by the best laws, and has found good and bad sides to both governing methods. In the end, he still proposed legislation as a better way. Aristotle treated the Rule of Law as a constituent feature of any regime. But in his work, the law has to be moderated, because every law also bears an intrinsic threat of domination. The unjust laws must be disobeyed. The justice of laws, therefore depends on the individual practice of good judgment- in good judgment Aristotle sees the rule of men. The Rule of Law, especially the Constitution, moderates the Rule of Men, and also the Rule of Men moderates the Rule of Law. On the need for the supremacy of the Rule of Law, Aristotle in Politics said:

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3 Elements of this idea could be found in other legal traditions. For more See Brown, N., *The Rule of Law in the Arab World*, Cambridge University Press, 1997; Rutner, K., *Rule of Law Ideas in Early China?,* Journal of Chinese Law. Vol. 6, 2002, pp.1-44.

4 See *The Code of Hammurabi* , Translated by L. W. King, [https://avalon.law.yale.edu/ancient/hamframe.asp] Accessed 12 March 2024.

5 Mańko, R., *Protecting the rule of law in the EU, Existing mechanisms and possible improvement*, European Parliamentary Research Service, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2019)642280], Accessed 15 March 2024; Mańko quotes: "*The origins of the notion of the rule of law can be traced back to ancient Greek political philosophy, where it was first formulated by Aristotle*."

Therefore it is preferable for the law to rule rather than any one of the citizens, and according to this same principle, even if it be better for certain men to govern, they must be appointed as guardians of the laws and in subordination to them; for there must be some government, but it is clearly not just, men say, for one person to be governor when all the citizens are alike. It may be objected that in any case which the law appears to be unable to define, a human being also would be unable to decide. But the law first especially educates the magistrates for the purpose and then commissions them to decide and administer the matters that it leaves over 'according to the best of their judgment,' and furthermore it allows them to introduce for themselves any amendment that experience leads them to think better than the established code. He therefore that recommends that the law shall govern seems to recommend that God and reason alone shall govern, but he that would have man govern adds a wild animal also; for appetite is like a wild animal, and also passion warps the rule even of the best men. Therefore, the law is wisdom without desire…[6]

However, Aristotle did not think of the Rule of Law as a perfect and impeccable principle. For him, the problem with the Rule of law was that general rules can not offer the solution in specific cases. Because of that, *epieikeia* (a principle of equality, and human justice in individual cases) cannot be realized. For those possible exceptions of the Rule of Law principle, Aristotle has found a solution*:*

But the difficulty first mentioned proves nothing else so clearly as that it is proper for the laws when rightly laid down to be sovereign, while the ruler or rulers in office should have supreme powers over matters as to which the laws are quite unable to pronounce with precision because of the difficulty of making a general rule to cover all cases. We have not however yet ascertained at all what particular character a code of laws correctly laid down ought to possess, but the difficulty raised at the start still remains; for necessarily the laws are good or bad, just or unjust, simultaneously with and similarly to the constitutions of states (though of course it is obvious that the laws are bound to be adapted to the constitution)…[7]

Although we have mentioned the indications of the Rule of Law in a simpler form in the time before the rise of Athenian democracy, the Greek phenomenon must be highlighted in the legal-historical dimension. The right to participate in the government, and enjoy judicial protection, as well as a defined procedure for electing and appointing officials can be seen as some of the legal institutes within the legal framework that can be regarded as the roots of the Rule of Law. Although

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6 Aristotle, *Politics*, Book 3, 1287a. [https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0058%3Abook%3D3%3Asection%3D1287a], Accessed 12 March 2024.

7 *Ibid.,* 1287b.

some scholars have argued about the protection of individual rights in classical Athens and emphasized the lack of such protection, in the ancient Greek form of the Rule of Law principle the protection of these rights existed to the extent that the historical development has allowed.[8].

In the Athenian reality, the Rule of Law was born even before democracy. It is evident from Drakon's laws, i.e. the listing of customs. Once written, laws have also bound the Greek courts which later became an essential lever of democratic action. With the arrival of Solon (595. BC) a state was created that was governed by the application of known rules.[9]

Solon was said to have established a state governed by the equality of laws through by the application of known rules.[10] The principles emanating from the Rule of Law have appeared in some form through the Middle Ages as well.[11] But this was largely a reflection of a system in which institutions were stronger than rulers. This is most visible in the English legal system and famous Magna Carta issued in 1215. That document, more than 800 years old, was the first which affirmed that the king and his government were not above the law.[12] The story of the development of the Rule of Law proceeds with medieval theorist John Fortescue and in the reflections of representatives of the Natural Law whose principles influenced the American and French revolutions. One of them was Thomas Hobbes, whose words can be interpreted as a link between the principle of legality itself and art. 7 ECHR (as a subject of our research): "*No law, made after a fact done, can make it a crime*".[13] He also added:" *Because if the fact be against the law of nature, the law was before the fact; and a positive law cannot be taken notice of before it be made, and therefore cannot be obligatory*."[14] The principle of legality has been further developed in historic-legal codes, influencing the development of the Universal Decla-

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8 See Forsdyke, S., *Ancient and Modern Conceptions of the Rule of Law*, pp. 184-212. [https://lsa.umich.edu/content/dam/classics-assets/classicsdocuments/FORSDYKE/ForsdykeRuleOfLaw.pdf], Accessed 22 March 2024; Others point out that concept of natural human rights was found in the medieval *ius commune*. For example Helmholz, R., H., *Fundamental Human Rights in Medieval Law*, University of Chicago Law School, Fulton Lectures, 2001, pp. 1-2. [http://chicagounbound.uchicago.edu/fulton_lectures], Accessed 12 March 2024.

9 Walker, Geoffrey de Q., *The Rule of Law: Foundation of Constitutional Democracy*, Melbourne University Press, 1988. p. 93.

10 Aristotle, *Athenian Constitution*, The original text available at [http://www.perseus.tufts.edu.], Accessed 12 March 2024.

11 The first several centuries of this period are known as the Dark Ages.

12 See the text *Magna Carta Libertatum* [https://www.archives.gov/files/press/press-kits/magna-carta/magna-carta-translation.pdf], Accessed 15 March 2024; The most famous clauses are art. 39. and 40.

13 Hobbes, *Leviathan*, chap. 27, 28.

14 More of principle of legality, crime and punishment in Leviathan in: Yates, A., *A Hohfeldian Analysis of Hobbesian Rights*, Law and Philosophy, Vol. 32, No. 4 ,2013, pp. 405-434.

ration of Human Rights[15] as well as the US Constitution. In the 17th century British Parliament adopted several constitutional acts, namely, the Petition of Rights (1628), the Bill of Rights (1689), and the Habeas Corpus Act (1679), according to which no one can be arrested and imprisoned without *writ of habeas corpus*[16], the arrest warrant. The provisions of the latter document concerns a guarantee of personal freedom from 17th century onward.

In the second half of 19th century, Albert Venn Dicey (a British lawyer and schoolar), made a significant contribution with his work "The Rule of Law". He concluded that the term Rule of Law includes the supremacy of the law (as opposed to arbitrariness), the equality of all persons before the law, as well as the principles establishing the rights of individuals developed through the centuries-long case law (in England).[17] In the 20th century (more precisely in 1960), Austrian economist and political theorist Friedrich von Hayek has emphasized the importance of Aristotle's work regarding the introduction of the separation of powers and supremacy of law concepts as essential features of a free state.[18] He also attributed to Aristotle the phrase, "government by laws and not by men."[19] Famous American justice *Sandra Day O'Connor*, talking about the independent judiciary[20], identified several "values" within the rule of law. According to her, „*the Rule of Law requires that legal rules be publicly known, consistently enforced and even-handedly applied, the separation of powers is "essential in maintaining the Rule of Law" in large part because it ensures decisions are made non-arbitrarily and the law is superior to any group or person "however powerful." The law should "always constrain the rule of man.*"[21] Her definition contains the concepts identified by the Greek, Roman, and British writers. For Justice O'Connor the independent judiciary is more than just an element of the rule of law, it is "*the foundation that underlies and supports the Rule of Law*."[22]

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15 Universal Declaration of Human Rights, [https://www.un.org/en/about-us/universal-declaration-of-human-rights], Accessed, 10 March 2024.

16 Habeas corpus means „bring out the body" – to bring the prisoner to court and let him know the reason, to prove the legality of imprisonment.

17 Venn Dicey, A., *The Rule of Law*, Introduction to the Study of the Law of the Constitution, St. Martin's Press, Vol. 181, 1959. pp. 188-196.

18 Hayek, F., *The Origins of the Rule of Law*, The Constitution of Liberty, University of Chicago Press, 1960., p. 162; Hayek traced the development of the Rule of Law through many centuries from the Greek and Roman world to the work of Edward Coke, William Blackstone, David Hume, and John Locke.

19 Stein, R., *Rule of Law: What Does It Mean*?, Minn. J. Int'l L. 18, No. 2, 2009, p. 297. [https://scholarship.law.umn.edu/faculty_articles/424], Accessed 19 March 2024.

20 She called independent judiciary the „lynchpin" of the Rule of Law.

21 See Stein, *op.cit*., note 19, p. 300; Stein quotes O'Connor. Day O'Connor, S., *Vindicating the Rule of Law: The Role of the Judiciary*, Chinese J. Int' l L, Vol. 2, No. 1, 2003.

22 Day O'Connor, *Ibid.,* p. 3

The historic emergence and development of the Rule of Law principle is an extensive and complex topic that we can not deal with in detail here. Precisely because of a need to shed the light on art. 7 ECHR we cannot avoid mentioning Beccaria whose work *Dei delitti e delle pene* (*On Crimes and Punishments*) was published in in 1764. He argued that penal practices were only justified if authorized by law: *"[L]aws alone can decree punishments for crimes, and … this authority resides only with the legislator, who represents the whole of society united by the social contract. Criminal laws should be framed in general terms, applying equally to all members of society, and the laws should only be applied by an impartial magistrate."*[23] Beccaria thought that criminal laws should be framed in general terms, applying equally to all members of society, and should only be applied by an impartial magistrate. Finally he concluded that *„[i]n order that punishment not be an act of violence perpetrated by one or many upon a private citizen, it is essential that it should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law"*.[24] The principle of legality was incorporated in many constitutions and penal codes enacted from the end of 18th century onward. It was also included in the aforementioned French Declaration of the Rights of Man and the Citizen (1789) which declared that "*no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offens*e".[25]

Further development of the Rule of Law principle has been reached in the Universal Declaration of Human Rights (1948) as well in the Art. 7. of the European Convention, which is brought to life by the practice of ECtHR (whose task is to ensure the scrutiny of domestic laws, promote the judicial review and uphold democratic ideals while respecting the authority of national bodies and the principle of subsidiarity).

The objective of this paper is to establish, show, and analyse the connection between the rule of law and the principle of legality in ECtHR case law, particularly referring to both principles of legality - in a broader sense and a narrower sense (*stricto sensu*), last embodied in Article 7 of the ECtHR (*nullum crimen, nulla*

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[23] This and the following Beccaria's quotes taken from Farmer L., *Punishment in the Rule of Law*, The Cambridge Companion to the Rule of Law, in: Meierhenrich, J.; Loughlin, M. (eds.), Published online by Cambridge University Press, 2021, [https://www.cambridge.org/core/books/cambridge-companion-to-the-rule-of-law/punishment-in-the-rule-of-law/A551676E9240E44DE4E627EC73CC14F3], Accessed 1 March 2024.

[24] *Ibid*.

[25] Déclaration des Droits de l'Homme et du Citoyen de 1789. [https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789], Accessed 15 March 2024.

poena sine lege). Additionally, the authors intend to examine how the elements of legality (in both broader and strict senses), foreseeability, and accessibility are interpreted in ECtHR case law, focusing specifically on select cases of particular interest. Therefore, the intended analysis methods are the legal-historical and quantitative statistical (case law) methods.

2. INTERSECTING: RULE OF LAW, DEMOCRACY, AND ECTHR LEGALITY

The rule of law asserts that all individuals and entities, irrespective of their social status, wealth, or power, are bound by the law. It reinforces the idea that everyone is equal in the eyes of the law.[26] As *Smerdel* notes, 'the rule of law' signifies a political system where citizens and state authorities (as addressees of legal norms) must respect the constitution, laws, and other regulations.[27] It guarantees that laws are enforced uniformly and fairly, without bias or favoritism. It is the cornerstone of democratic societies, ensuring all individuals are treated equally under the law.[28] In addition, it encompasses the requirement that laws must be clear, predictable, and applied consistently to all people and entities.[29] In that regard, *Zand* emphasizes that "democracy does not simply entail the majority always prevailing",[30] but demands a balance ensuring fair treatment of minorities and preventing the abuse of dominant positions. This perspective resonates with the ECtHR's commitment to the rule of law, emphasizing the protection of minority rights and upholding principles of justice, equality, and prevention of arbitrary power.[31]

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[26] Omejec J., *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava: Strasbourški acquis,* Novi informator, Zagreb, 2013, p. 1087.

[27] Smerdel, B., *Ustavno uređenje europske Hrvatske*, II izmijenjeno i dopunjeno izdanje, Narodne novine d.d., Zagreb, 2020, p. 9.

[28] Omejec, *op.cit*., note 26, p. 1087.

[29] *Ibid.*

[30] Zand, J., *The Concept of Democracy and the European Convention on Human Rights*, University of Baltimore Journal of International Law, Vol. 5, No. 2, 2017, Article 3, p. 200; [https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1058&context=ubjil], Accessed 20 February 2024.

[31] In addition The UN definition of the rule of law by the Report of the Secretary General of the United Nations,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. -UN The rule of law and transitional justice in conflict and post-conflict societies: *Report of the Secretary-General*, p.4, §6, available at: [https://www.unhcr.org/media/rule-law-and-transitional-justice-conflict-and-post-conflict-societies-report-secretary], Accessed 1 June 2024.

Lauc highlights the importance of the 2011 Report on the Rule of Law by the Venice Commission of the Council of Europe,[32] which outlined "necessary elements of the rule of law"[33]. One of the primary principles is legality, and the report identified *Rechtstaat* principles that are both formal and substantial, suggesting areas where consensus could be achieved.[34]

Furthermore, he notes that all laws, regulations, and authorities' actions should be based on regulations consistent with the law and constitution, as they form the foundation for upholding the principle of the rule of law.[35] However, *Boka's* proposal to integrate alternative reasoning methods, like the comparative method, into national constitutional law systems can be risky. [36] While it may offer advantages, it also opens the door to influence by interest groups. Allowing entities to tailor laws to their interests threatens the rule of law principle. However, checks and balances typically mitigate such potential abuses. In connection to this, *Omejec* notes Radbuch's 1946 formula, which proposes that legal norms conflicting with justice requirements or intentionally crafted to deny equality should be abolished, reflecting values emphasized by the European Court of Human Rights (ECtHR).[37] Germany's *Rechtsstaat* tradition, emblematic of rule-based governance, exempli-

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32 Report on the Rule of Law, European Commission for Democracy through Law (Venice Commission) 86th plenary session (Venice, 25–26 March 2011), Study 512/2009, CDL-AD(2011)003rev. Strasbourg, 4 April 2011.

33 For more see Craig, 2019, pp 156-187.

34 Lauc, Z., *Načelo vladavine prava u teoriji i praksi*, Pravni vjesnik, Vol. 32, No. 3-4, 2016, p. 57: The Venice Commission of the Council of Europe (2011), which outlined the "necessary elements of the rule of law", 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)." Later, this definition was further developed to include eight "constituent parts" of the rule of law, elaborating on specific elements essential for its understanding and implementation: "1. accessibility of the law, which means that it must be intelligible, clear, and predictable; 2. questions of legal right must normally be decided based on the law, not based on 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."

35 *Ibid.,* p. 51

36 Bóka, J., *Use of the Comparative Method by the Hungarian Constitutional Court-Conceptual and Methodological Framework for an Ongoing Research Project*, Internationale Konferenz zum zehnjährigen Bestehen des Instituts für Rechtsvergleichung der Universität Szeged, No. 1, 2014, p. 103, [https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/7363/file/S93-107_aiup01.pdf], Accessed 24 February 2024; See also Bóka, J., *Forcible Measures Against International Terrorism and the Rule of Law,* Proc. Am. Soc. Int. L., 1963, Vol. 13, 2002, [https://www.uni-miskolc.hu/uni/res/e_publications/pdf/boka.pdf], Accessed 24 February 2024.

37 Omejec, *op.cit.*, note 26, p. 1086.

fies the necessity for adherence to established laws within legal and constitutional frameworks. *Meierhenrich* underscores the significance of Germany's post-World War II Rechtsstaat tradition, aimed at holding elites accountable and preventing the recurrence of dictatorship, mirroring principles upheld by the ECtHR.[38] *Deinhammer* echoes this sentiment, stressing the importance of political authority and governance aligning with established laws within legal and constitutional frameworks, akin to the mission of the ECtHR, which seeks to mitigate arbitrary authority and its ensuing harm. [39] However, *Varga* raises a pertinent question about the adaptability of longstanding legal values to modern challenges. He explores traditional limitations of the rule of law in addressing contemporary issues such as media influence and global financial coercion.[40]

Further discourse on the relationship between the rule of law and the European Court of Human Rights (ECtHR) centers on aligning human rights and legal principles.[41] Establishing the European Convention of Human Rights (the Convention or ECHR) framework for safeguarding human rights has been pivotal in fostering a broader acceptance of judicial oversight concerning human rights issues and strengthening the rule of law. The ECtHR is integral to upholding the rule of law, legality (in the broader sense), and legality *stricto sensu* in Article 7 of ECHR. The ECHR framework promotes judicial oversight of human rights issues, facilitated by legality and judicial review. With its roots in the principle of legality, this framework plays a significant role in promoting judicial review of governmental actions,[42] thereby upholding the rule of law. ECtHR also, by its judgment, makes a law that then becomes part of the rule of law. Therefore, it can be said that ECtHR simultaneously acts according to the rule of law principles and makes a law that is then integrated into the rule of law. However, the ECtHR's effectiveness relies on member states' consent despite its significant role in advancing law and constitutional scrutiny.[43] According to *Lautenbach,* the ECtHR cannot function as a court of final appeal (fourth-instance court), and the duty of

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38 Meierhenrich, J. *Rechtsstaat versus the Rule of Law*, in: Meierhenrich, J.; Loughlin, M. (eds.), The Cambridge Companion to the Rule of Law, Cambridge University Press, 2021, p. 40.

39 Deinhammer, R., *The Rule of Law: Its Virtues and Limits*, Obnovljeni život, Vol. 74, No. 1, 2019, pp. 33, 36.

40 Varga, Cs., *Rule of Law: Contesting and Contested*. Budapest: Ferenc Madl Institute of Comparative Law, 2021, pp 95-99, [https://doi.org/10.47079/2021.csv.rolcac], Accessed 20 February 2024.

41 See Leloup, M., *The Concept of Structural Human Rights in the European Convention on Human Rights,* Human Rights Law Review, Vol. 00, No. 1–22, 2020.

42 Lautenbach, G., *The Concept of the Rule of Law and the European Court of Human Rights*, Oxford University Press, 2013, p. 190.

43 See Lautenbach, *Ibid.,* p. 189

interpreting national law primarily rests with national authorities.[44] In balancing its oversight role with the authority of national courts in interpreting domestic laws, the ECtHR faces a challenge.[45] While national authorities are responsible for applying domestic legislation, the Convention requires interference with Convention rights to conform to national legal frameworks. This delicate balance, as noted by *Gerards,* underscores the need for effective oversight while respecting the primary role of national courts[46]. To ensure robust human rights protection, the ECtHR may need to examine how national authorities interpret and enforce domestic laws while also considering the principles of legality (in the broader sense) and Article 7 of the ECHR (principle of legality *stricto sensu*).[47] In its broader sense, the principle of legality encompasses the law's existence and quality. The quality of the law also includes accessibility and foreseeability. In addition, *Lauc* outlines three criteria for assessing law quality as one of the legality elements: enactment manner, [48] legal solution quality, [49] and law stability. [50]

However, only two of the mentioned elements (subprinciples) of legality – accessibility and foreseeability – will be addressed further in the text. These are the most important and the most common in the ECtHR jurisprudence when assessing the principle of legality.

2.1. ECtHR's Definition of the Rule of Law

The ECtHR's definition of the rule of law lacks a singular comprehensive definition, as pointed out by *Lautenbach*.[51] While the ECtHR doesn't extensively define

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44 *Ibid*., p. 190.

45 Gerards, J., *The European Court of Human Rights and the national courts: giving shape to the notion of 'shared responsibility*, in: Gerards, J.; Fleuren, J. (eds.), Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case-law - A comparative analysis, Intersentia, Cambridge-Antwerp-Portland, 2014, p. 23; Lautenbach, *Ibid.,* p. 85

46 Gerards, *Ibid.,* p. 23.

47 Lautenbach, *op. cit.,* note 42, pp 85, 86.

48 Lauc, *op. cit.,* note 34, p. 58: Timely adoption, the possibility of influence of all interest groups on the adoption of legal solutions, the availability of the proposed law to the public and the holding of a public debate on the proposal, leaving enough time from the passing of the law to its application so that citizens can become familiar with content of the law, preparation of detailed explanations of proposals for better interpretation).

49 *Ibid.*: That the provisions are written in a clear language that everyone can understand, that they are specific and do not limit the freedom of citizens to an excessive extent, that they do not leave legal gaps, that the laws are harmonized with each other, that adequate means are provided for the application of the law and to foresee the control mechanisms of its implementation as well as sanctions for non-implementation. -

50 *Ibid*.: Requirement that laws do not change often. -

51 Lautenbach, *op. cit.,* note 42, p. 17

concepts in its judgments, it frequently references the rule of law across various topics.[52] It uses this principle to justify interpretations of Convention rights and enhance human rights protection as noted by *Goldstein* and *Ban*.[53] The ECtHR's flexible perspective on law allows it to accommodate differences between legal systems, ensuring legal certainty and equality before the law.[54] Adhering to "rigid regulation" alone is insufficient for the rule of law, as noted by *Lauc*.[55] *Nagy* emphasizes that the ECHR and the ECtHR are designed to benefit a broad range of countries.[56] The European Court of Human Rights (ECtHR), in the case *Golder v. United Kingdom*,[57] emphasized the importance of considering the preamble as integral when interpreting international treaties.[58] This principle highlights the significance of not overlooking the preamble, as it provides crucial context and insights into the treaty's objectives and principles as part of the rule of law principle. This standpoint on the rule of law aligns with the substantive element of the rule of law, according to Stein's perspective. *Stein* suggests that the rule of law encompasses both procedural and substantive aspects. [59] Procedurally, laws must be supreme, publicly announced, and applied impartially, strictly adhering to the separation of powers. Substantively, laws must align with international human rights norms (and its preamble) to ensure justice and prevent arbitrariness.

Sicilianos discussed the rule of law and the ECtHR, particularly the judiciary's independence, which has empowered it and enhanced acceptance of judicial review.[60]

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52 *Ibid.*

53 Goldstein, L.; Ban, C., *The Rule of Law and the European Human Rights Regime*, JSP/Center for the Study of Law and Society Faculty Working Papers, University of California, Berkeley, paper 13, 2003, p. 3 [https://biblioteca.cejamericas.org/bitstream/handle/2015/986/rule-law-europe.pdf?sequence=1&isAllowed=y], Accessed 26 February 2024.

54 Lautenbach, *op. cit.,* note 42, p. 85.

55 Lauc, *op. cit.,* note 34, p.58.

56 Nagy, C. I., *The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation à L'Européenne*, German Law Journal, Vol. 21, No. 5, 2020, p. 842, fn 12; [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/86606E9A6973BE6437E54A9FB4BD5F4B/S2071832220000449a.pdf/the-diagonality-problem-of-eu-rule-of-law-and-human-rights-proposal-for-an-incorporation-a-leuropeenne.pdf], Accessed 20 February 2024.

57 ECtHR Judgment, *Golder v. United Kingdom*, (Appl. no. 4451/70), 21 February 1975, § 34; [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Golder%20v.%20United%20Kingdom%22],%22itemid%22:[%22001-57496%22]}], Accessed 26 February 2024.

58 Lauc, *op. cit.,* note 34, p. 58.

59 Stein, R. A., *What Exactly Is the Rule of Law?,* 57 Hous. L. Rev. 185, Vol. 57, Issue 1, 2019, CDT, [https://houstonlawreview.org/article/10858-what-exactly-is-the-rule-of-law], Accessed 29 February 2024.

60 The Council of Europe's Parliamentary Assembly has addressed the rule of law issues, including the independence of the judiciary, in its 2017 Resolution on New threats to the rule of law in Council of Europe Member States, with a special focus on the rule of law in Bulgaria, the Republic of Moldova, Poland, Romania, and Turkey. The Venice Commission has tackled these issues in its opinions on Bul-

An independent judiciary[61] is crucial for upholding the rule of law.[62] Considering the significance of the independent judiciary, as well as the importance of international treaties when discussing and implementing the principle of the rule of law, there has been one interesting case regarding judicial independence in Poland. The *Grzęda v. Poland* case[63] drew attention on December 20, 2017, when the European Commission initiated proceedings under Article 7(1) of the Treaty on European Union (TEU).[64] This marked the first such action by the Commission.[65] In its proposal to the Council of the European Union, the Commission highlighted a distinct and substantial risk of a serious breach of the rule of law in Poland, particularly regarding the independence of the judiciary. [66] The Commission expressed concern over Poland's enactment of more than thirteen consecutive laws within two years, systematically granting the executive and legislative branches significant authority to interfere with the judicial system's structure and operations.[67] This revision emphasizes the importance of the rule of law and highlights the specific concerns raised by the European Commission regarding Poland's judiciary, which aligns more closely with the theme of the ECtHR and its focus on legality and the rule of law.

2.2. ECtHR's Legality Issues

Addressing legality concerns within the ECtHR framework is essential for upholding the rule of law.[68] *Lautenbach* notes that while the Convention articles and

garia (2016), Poland (two in 2016 and two in 2017), Turkey (two in 2017), Romania (2018 and 2019), Malta (2018) and Serbia (2018)"- Speech by Linos-Alexandre Sicilianos (2020), The Rule of Law and the European Court of Human Rights: the independence of the judiciary; [https://www.echr.coe.int/Documents/Speech_20200228_Sicilianos_Montenegro_ENG.pdf], Accessed 26 February 2024; See also [https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24214&lang=en], Accessed 26 February 2024.

61 See Sillen, J., *The concept of 'internal judicial independence' in the case law of the European Court of Human Rights*, European Constitutional Law Review, Vol. 15, No. 1, 2019, pp 104-133, [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/384E519248A7571C6126628A345C324D/S1574019619000014a.pdf/the-concept-of-internal-judicial-independence-in-the-case-law-of-the-european-court-of-human-rights.pdf], Accessed 20 February 2024.

62 Fore more see Padjen, I., *Vladavina prava i tajnost pravosuđa*, Godišnjak Akademije pravnih znanosti Hrvatske, Vol. XIII, No.1, 2020, pp 1-12.

63 ECtHR Judgment, *Grzęda v. Poland* (Appl. no. 43572/18), 15 March 2022; § 24; [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22rule%20of%20law%22],%22itemid%22:[%22001-216400%22]}], Accessed 20 February 2024.

64 Judgment, *Grzęda v. Poland*, § 24

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

68 Lautenbach, *op. cit.,* note 42, p. 70

ECtHR rulings do not explicitly mention "legality," they refer to variations of the term "lawfulness." [69] However, "legality" is used instead of "lawfulness" due to its broader connotation.[70] While "lawfulness" emphasizes compliance with laws and procedures, "legality" also requires alignment with external requirements like generality and certainty. [71] This term better reflects how the ECtHR evaluates compliance with national laws and procedures, considering the overall quality of those laws and external principles associated with the rule of law.

When discussing legality, we can distinguish between 'legality in the broader sense' and 'legality *stricto sensu*', the latter encompassing the principles outlined in Article 7 of the Convention. Two key aspects of legality must be considered to ensure compliance with Convention rights.[72] Firstly, how was the national law enacted (existence of the law)? Secondly, this law must meet specific quality criteria (quality of the law). An autonomous legality review is preferred over one solely based on national law.[73] These steps must be followed and exist for both legalities in a broader and narrower sense.

The ECtHR can assess the legality of all the rights and freedoms in the Convention. Therefore, all articles of the ECHR that regulate specific rights or freedoms are subject to legality assessment. In ECtHR case law, legality means that rights violations must be based on national laws that meet specific quality standards. It emphasizes the quality of national laws rather than their substance, enabling the ECtHR to scrutinize and protect Convention rights effectively. Derived from the broader concept of the rule of law, legality ensures fair and just procedures, thereby upholding the integrity of the Convention as a supra-constitutional framework.[74]

In the context of Article 7 of the Convention (legality in *stricto sensu, nullum crimen, nulla poena sine lege*),[75] legality primarily demands the existence of national law as the basis for deprivation of liberty or punishment, alongside quality stan-

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69 *Ibid.,* p. 42

70 *Ibid*., p. 73

71 *Ibid.*p. 42

72 Murphy, C. C., *The Principle of Legality in Criminal Law Under the ECHR*, European Human Rights Law Review, Vol. 2, 2010, p. 192, [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1513623], Accessed 26 February 2024.

73 Lautenbach, *op. cit.,* note 42, p. 124.

74 *Ibid.,* pp 85, 87, 122, 189.

75 Krstulović Dragičević, A.; Sokanović, L., *Načelo zakonitosti pred izazovima Europskog kaznenog prava*', Zbornik radova s međunarodnog znanstvenog savjetovanja „Europeizacija kaznenog prava i zaštita ljudskih prava u kaznenom postupku i postupku izvršenja kaznenopravnih sankcija, Pravni fakultet Sveučilišta u Splitu, 2017, pp 25-45.

dards for laws affecting Convention rights.[76] The ECtHR first confirms the presence of national law and then evaluates its quality. Legality also applies to limitation clauses in Convention provisions, including Article 7, determining permissible interferences with human rights. Such interferences must be lawful, serve a legitimate aim, and be necessary in a democratic society. The ECtHR evaluates whether the government aims to align with the rule of law and ensures proportionality between interference and the aim pursued. This includes assessing national law's quality and proportionality in justifying interferences with individual rights.[77]

2.3. Accessibility and Foreseeability as Legality Elements (The Legality in Broader Sense and *Stricto Sensu*)

The ECtHR evaluates the quality of national law through the lens of legality, with accessibility and foreseeability as key factors. These requirements derive from the concept of the rule of law.[78] The rule of law serves as a crucial safeguard against excessive government intrusion. However, its primary emphasis lies in ensuring the proper structure of national law rather than controlling its substance. Legality in ECtHR jurisprudence requires law within the national legal system and adherence to specific quality benchmarks.[79]

Accessibility is also crucial, requiring laws to be accessible and accompanied by adequate judicial safeguards, especially with broad discretionary powers.[80] Hence, accessibility is essential in the ECtHR's assessment of national law. It demands that individuals affected by legislation be sufficiently aware of its contents.[81] While publication isn't always required, the ECtHR considers the circumstances of each case.[82] However, accessibility standards may vary, except for technical or professional areas. Instructions and administrative practices are also relevant if individuals are aware of their contents. Furthermore, accessibility standards may be less stringent for professionals and technical domains within the legal framework,[83] as it can be seen in the following cases. For instance, in the *Groppera Radio Ag and others v. Switzerland* case,[84] the ECtHR ruled that accessibility was satisfied even though the

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76 Lautenbach, *op. cit.,* note 42, pp 70-72

77 *Ibid.*

78 *Ibid.*

79 *Ibid*., p. 70.

80 *Ibid*., p. 89.

81 Fore more see: Krstulović Dragičević; Sokanović, *op. cit.,* note 75, pp 25-45.

82 *Ibid*.; Lautenbach, *op. cit.,* note 42, p. 88

83 Krstulović Dragičević; Sokanović, *Ibid.;* Lautenbach, *Ibid.*

84 ECtHR Judgment, *Groppera Radio Ag and others v. Switzerland*, (Appl. no. 10890/84), 28 March 1990, § 68 and 75; [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Groppera%20Radio%20

regulations were not published due to the exceptional nature of the case.[85] Lower-ranking instructions and administrative practices can also be relevant to assessing the quality of the law, provided that individuals affected by them are adequately informed of their content.[86] However, it can be said that if the accessibility principle is not satisfied, it is unlikely that the foreseeability principle will be satisfied.

In the *Kononov v. Latvia* case,[87] the ECtHR held a former military officer, Kononov, accountable for not being aware of fundamental customary rules.[88] Specifically, Kononov, a former member of the Soviet army, was expected to be aware of the fundamental customary rules of *jus in bello*.[89] Even though international laws and customs of war were not published, the ECtHR's decision emphasized that Kononov, as a commanding military officer, should have been aware of the unlawfulness of ill-treatment and killing of civilians under the laws and customs of war.[90] The fact that international laws and customs of war were not published (were not accessible) did not affect the ECtHR decision.[91] Accessibility is crucial, and the ECtHR evaluates it meticulously, considering each case's specifics.[92]

It seems that ECtHR has relativized the accessibility principle depending on the context, such as technical or professional areas and international humanitarian law. The ECtHR carefully considers the circumstances of each case when evaluating accessibility standards, recognizing that publication is not always necessary. Lower-ranking instructions and administrative practices may also be relevant in assessing the quality of the law, provided that individuals affected by them are adequately informed. In cases such as *Groppera Radio Ag and others v. Switzerland*, the ECtHR may deem accessibility satisfied even without publication, considering the exceptional nature of the case. Further, in cases like *Kononov v. Latvia,* individuals, especially those in positions of authority, are expected to be aware of fundamental legal principles, even if they are not explicitly published.

Foreseeability, also a key aspect or subprinciple of both legalities (in the broader sense and the *stricto sensu*) within the Convention's framework, involves clarity

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Ag%20v%20Switzerland%20case%22],%22itemid%22:[%22001-57623%22]}], Accessed 24 February 2024.

85 See also: Lautenbach, *op. cit.,* note 42, pp 87-88.

86 *Ibid*.

87 ECtHR Judgment, *Kononov v. Latvia*, (Appl. no. 36376/04), 17 May 2010, §§ 245-246; [https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-98669%22]}], Accessed 24 February 2024

88 Fore more see: Krstulović Dragičević; Sokanović, *op. cit.,* note 75, pp 25-45.

89 Lautenbach, *op. cit.,* note 42, p. 88

90 *Ibid.*

91 ECtHR Judgment, *Kononov v. Latvia*, §§ 245-246

92 *Ibid*., §§ 185-187, and 235-244; see also Lautenbach, *op. cit.,* note 42, p. 88.

and precision in laws to ensure individuals understand their rights and legal consequences. The ECtHR examines foreseeability by assessing clarity and flexibility, particularly focusing on cases involving discretionary powers.[93] The ECtHR examines two aspects of foreseeability: precision and generality, seeking a balance between clarity and flexibility.[94] Retroactive law application is typically prohibited in criminal cases unless it involves lenient criminal laws aiming to maintain fairness. Foreseeability emphasizes individuals' understanding of legal consequences without requiring legal expertise or a single interpretation. [95]

2.4. Cohesion between Legality- Accessibility, Foreseeability, and Judicial Safeguards in ECtHR in the Context of the Rule of Law

The rule of law mandates the presence of judicial safeguards across all Convention articles.[96] Nearly all articles of the Convention encompass substantive and procedural dimensions, with Articles 6 and 13 exclusively focusing on procedural aspects. Therefore, judicial safeguards are crucial for legality and upholding the rule of law within the Convention, ensuring that individuals' rights are protected effectively. According to *Lautenbach*, the ECtHR's consistency in mentioning judicial safeguards as part of legality is questioned. [97] However, legality inherently requires the implementation of such safeguards.[98] This is emphasized by the ECtHR, particularly in cases involving extensive governmental discretion, as demonstrated in *Klass and others v Germany*,[99] in which ECtHR elaborated on whether German laws regarding secret surveillance methods violated the applicant's right to privacy (Art. 8 ECHR), and a critical question was whether Art. 8 necessitated judicial control over the use of secret surveillance methods.[100]

In certain instances, the necessity of judicial safeguards becomes apparent when examining the application of *accessibility and foreseeability* principles to specific

93 Lautenbach, *op. cit.,* note 42, pp 70, 88, 121.

94 *Ibid*., p. 88.

95 *Ibid.,* p. 89.

96 *Ibid*., p. 101.

97 *Ibid*.

98 *Ibid*.

99 ECtHR Judgment, *Klass and others v. Germany*, (Appl. no. 5029/71), 6 September 1978, §§ 37-38 and 39-60; [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Klass%20v%20Germany%22],%22itemid%22:[%22001-57510%22]}], Accessed 22 February 2024.

100 *Ibid.*

case circumstances.[101] For example, in the *Amuur v France*[102] In the case regarding administrative detention, the ECtHR underscored the importance of national law in meeting quality standards and adhering to the rule of law. [103] The inability of ordinary courts to review detention conditions or impose time limits led the ECtHR to deem French law inadequate, resulting in a breach of the right to liberty.[104] While judicial safeguards are not explicitly mentioned in such cases, their presence is implied from the foreseeability of the law. This inclusion of judicial safeguards as part of legality overlaps with the right to a fair trial (Art. 6) and the right to an effective remedy (Art. 13). While some find this overlap problematic, Article 6 remains vital for ensuring proper legal procedures, reinforcing the significance of accessibility, foreseeability, and legality under Article 7 of the ECHR.[105]

Judicial safeguards are essential for legality, ensuring that laws are applied fairly and within legal limits.[106] This is particularly pertinent in the context of Article 7 of the ECHR, which safeguards individuals from retroactive criminal laws.[107]

3. EXPLORING RULE OF LAW CHALLENGES –ARTICLE 7 OF THE ECHR (LEGALITY PRINCIPLE –*STRICTO SENSU*)

The principle of legality, enshrined in Article 7 of the Convention (No punishment without law; *nullum crimen, nulla poena sine lege*), stands as a cornerstone of the rule of law, particularly within the realm of criminal substantive law.[108] It must be noted that both elements of foreseeability and accessibility must be present; otherwise, it will constitute a violation of legality and Article 7 of the ECHR. According to the case law of the ECtHR the principle of legality, as prescribed by Article 7 of the Convention, means that only those criminal acts and sanctions already prescribed by law can be committed and imposed. The offense must be precisely defined, meaning that individuals must be able to understand clearly from

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101 *Ibid.*

102 ECtHR Judgment, *Amuur v. France*, (Appl. no. 19776/92), 25 June 1996, §§ 28 and 63; [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Amuur%20v%20France%22],%22itemid%22:[%22001-57988%22]}], Accessed 22 February 2024.

103 See also Lautenbach, *op. cit.,* note 42, p. 101.

104 *Ibid.*

105 *Ibid*., p. 102

106 *Ibid.,* p. 101

107 *Ibid.*

108 See Polacchini, F., *The Relationship Between Positive Obligations of Incrimination Under the ECHR and the Constitutional Principle of Legality in Criminal Matters in the Italian Legal System*, in: Arnold, R.; Martínez-Estay, J. (eds.), Rule of Law, Human Rights and Judicial Control of Power. Ius Gentium: Comparative Perspectives on Law and Justice, Springer, Cham, Vol. 61, 2017, pp 377–389, [https://doi.org/10.1007/978-3-319-55186-9_21], Accessed 26 February 2024.

the wording of the relevant legal provision when their actions or omissions will lead to criminal liability.[109] To maximize the protection of individuals from the arbitrary interpretation of regulations by national authorities and, in connection with that, from arbitrary prosecution, conviction, or punishment, regulations, and judicial practice must be accessible and foreseeable (clear and predictable). This ensures that individuals are aware of their rights and obligations and enables them to have a fair trial and fair application of the law.[110]

It holds paramount importance within the Convention's protection system, [111] highlighted by its non-derogable status even in times of war or public emergency,[112] as underscored in cases such as *S.W. v. the United Kingdom*,[113] *Del Río Prada v. Spain*,[114] and *Vasiliauskas v. Lithuania*[115]. This principle serves as a vital safeguard against arbitrary prosecution, conviction, and punishment, aligning with the overarching object and purpose of the Convention. [116] The European Court of Human Rights (ECtHR) interprets non-retroactivity and the principle of *nulla poena sine lege* to mandate that offenses be clearly defined by law and that the law be readily *accessible* and *foreseeable*. [117] This interpretation underscores the imperative for legal certainty and predictability within the criminal justice system, thereby safeguarding the rights of individuals under the Convention.[118] Article 7 necessitates that criminal statutes be interpreted restrictively, ensuring that individuals are not unfairly disadvantaged through expansive interpretations or analogies.[119] In the

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109 Krstulović Dragičević, A., *Načelo zakonitosti u praksi Europskog suda za ljudska prava*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 23, No. 2, 2016, pp. 403-433.

110 Bonačić, M.; Tomašić, T., *Implementacija standarda Europskog suda za ljudska prava u hrvatskom prekršajnom pravu i praksi*, Hrvatski ljetopis za kaznene znanosti i praksu, Zagreb, Vol. 24, No. 2, 2017, p. 395.

111 Guide on Article 7 of the European Convention on Human Rights - No punishment without law: the principle that only the law can define a crime and prescribe a penalty, Updated on 30 April 2022, § 1.

112 *Ibid.*

113 ECtHR Judgment, *S.W. v. the United Kingdom*, (Appl. no. 20166/92), 22 November 1995, § 34; [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22S.W.%20v.%20the%20United%20Kingdom%22],%22itemid%22:[%22001-57965%22]}], Accessed 22 February 2024.

114 ECtHR Judgment, *Del Río Prada v. Spain*, (Appl. no. 42750/09), 21 October 2013,§ 77 [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Del%20R%C3%ADo%20Prada%20v.%20Spain,%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-127697%22]}], Accessed 22 February 2024.

115 ECtHR Judgment, *Vasiliauskas v. Lithuania*, (Appl. no. 35343/05), 20 October 2015, § 153; [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Vasiliauskas%20v.%20Lithuania%22],%22itemid%22:[%22001-158290%22]}], Accessed 22 February 2024

116 Guide on Article 7, § 1.

117 *Ibid.*

118 *Ibid.*

119 Lautenbach, *op. cit.,* note 42, p. 72.

context of criminal law, the principle of legality constitutes a fundamental component of the Convention's rule of law framework.

Therefore, the paper will elaborate further on how the ECtHR interprets the scope and reach of the principle of legality *stricto sensu* and its elements of foreseeability and accessibility in certain cases.

3.1. Judicial Interpretation of Art. 7 in the Case of *Yüksel Yalçinkaya v. Turkey*

The foreseeability as an element of legality was challenged in the case of *Yüksel Yalçinkaya v. Turkey*.[120] The European Court of Human Rights (ECtHR) emphasized the significance of the guarantee enshrined in Article 7 of the Convention, highlighting its pivotal role within the rule of law and providing robust protections against arbitrary prosecution, conviction, and punishment.[121] The applicant was convicted of terrorism solely on the grounds of membership in two associations, a trade union and an association that was considered to be affiliated with the FETÖ/PDY, for having a bank account in Bank Asya and the ByLock app on his cellphone. However, under Turkish law, the criminal offense of terrorism must include specific intent, which was not established in the applicant's case. Therefore, the elements of the crime were not met. In addition, insufficient safeguards allowed the applicant to challenge the evidence. Consequently, the ECtHR concluded that there was a violation of Article 7 of the Convention.[122] The ECtHR concluded that despite the challenges posed by combating terrorism, particularly with evolving tactics,[123] and the exceptional difficulties faced by Turkish authorities in dealing with the FETÖ/PDY (an alleged terrorist organization employing covert methods),[124] the core safeguards of Article 7, which constitute a non- derogable right at the heart of the rule of law principle, must be maintained.[125] However, domestic courts applied an extensive interpretation, effectively imposing, in fact, strict liability, which diverged from both domestic law and the Convention's objectives. [126]

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120 ECtHR Judgment, *Yüksel Yalçinkaya v. Turkey*, (Appl. no. 15669/20), 26 September 2023, §§ 243, 267; [https://hudoc.echr.coe.int/eng#{%22appno%22:[%2215669/20%22],%22itemid%22:[%22001-227636%22]}], Accessed 22 February 2024

121 As indicated in the cases of *Scoppola v. Italy (no. 2)* (Appl. no. 10249/03), 17 September 2009, § 92, and *Del Río Prada,* § 77 - ECtHR Judgment, *Yüksel Yalçinkaya v. Turkey*, (Appl. no. 15669/20), 26 September 2023, §;237.

122 *Ibid.*, §;272.

123 ECtHR Judgment, *Yüksel Yalçinkaya v. Turkey*, §;269

124 *Ibid.*

125 *Ibid.*, §;270

126 *Ibid.*

3.2. Judicial Interpretation and Punishment Based on International Criminal Law in *Cases Streletz, Kessler, and Krenz v. Germany, Vasiliauskas v. Lithuania, and Kononov v. Latvia*

The concept of judicial interpretation, even in the context of state succession scenarios, upholds the principle of justice and accountability. In cases where there is a change in State sovereignty or political regime within national territory, it is considered legitimate for a State to initiate criminal proceedings against individuals who committed crimes under a former regime. This principle ensures that justice is upheld and that individuals are held accountable for their actions, regardless of political changes. [127]

Article 7 permits punishment based on international (humanitarian) criminal law,[128] as illustrated in the case of *Kononov v. Latvia*.[129] Contracting Parties are primarily obligated to safeguard this right, as established in various cases such as *Streletz, Kessler, and Krenz v. Germany*,[130] and *Vasiliauskas v. Lithuania*.[131] The tolerance or encouragement of acts considered criminal under national or international legal instruments, along with the impunity it fosters among perpetrators, should not impede their prosecution and punishment, as affirmed by the ECtHR.[132] This legitimacy extends to the successor State's courts, which inherit the responsibility of interpreting and applying legal provisions in accordance with the principles of a State governed by the rule of law. [133] This principle is exemplified by cases such as

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127 Guide on Article 7, § 44

128 Lautenbach, *op. cit.,* note 42, p. 72

129 ECtHR Judgment, *Kononov v. Latvia*, (Appl. no. 36376/04), 17 May 2010, § 241; [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Kononov%20v.%20Latvia%22],%22itemid%22:[%22001-98669%22]}], Accessed 25 February 2024

130 ECtHR Judgment, *Streletz, Kessler and Krenz v. Germany,* (Appl. nos. 34044/96, 35532/97 and 44801/98), 22 March 2001, §§ 77-89; https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Streletz,%20Kessler%20and%20Krenz%20v.%20Germany%22],%22itemid%22:[%22001-59353%22], Accessed 25 February 2024; See Derenčinović, D., *Povodom presude Europskog suda za ljudska prava u predmetu Streletz, Kessler i Krenz protiv Njemačke*, pp 21-41, in: Derenčinović, D. (ed.), Ogledi o pravu i pravdi u dvije Europe- putovi i stranputice europskog kaznenog prava od Strasbourga do Bruxellesa, Narodne novine, Zagreb, 2021; *Zupancic* has interesting standpoint regarding this case. *Zupancic* emphasizes that when constitutional courts are criticized for supposedly exceeding their narrow "concretizing" role and venturing into the "abstract" realm of legislative authority, it's paradoxically done in the name of upholding the very "rule of law" they undermine.; Zupancic, B., *Constitutional Law and the Jurisprudence of the European Court of Human Rights: An Attempt at a Synthesis*, German Law Journal, Vol. 2, No. 10, 2001, p.4, § 9E2; [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/16073C3FB3168820736EC8BFA2EC139A/S2071832200003576a.pdf/constitutional-law-and-the-jurisprudence-of-the-european-court-of-human-rights-an-attempt-at-a-synthesis.pdf], Accessed 24 February 2024.

131 ECtHR Judgment, *Vasiliauskas v. Lithuania*, §§ 158-162 and §191.

132 Guide on Article 7, § 44.

133 Guide on Article 7, § 44.

Streletz, Kessler, and Krenz v. Germany, [134] and *Vasiliauskas v. Lithuania*[135]. In these cases, the courts of the successor State justified their actions by interpreting and applying the relevant legal provisions in line with the rule of law principles.

Additionally, the European Court of Human Rights (ECtHR) found the convictions of GDR political leaders in *Streletz, Kessler, and Krenz v. Germany*[136] foreseeable. Similarly, convictions of a border guard for murders of East Germans attempting to leave the GDR between 1971 and 1989 were deemed justified. These convictions were based on GDR legislation and pronounced by German courts after reunification.[137] Almost the same conclusion was reached in the *Kononov v. Latvia*[138] case regarding the conviction of a commanding officer of the Soviet army for war crimes during World War II. Latvian courts, operating after Latvia declared independence in 1990 and 1991, were considered legitimate in their interpretation and application of the law. [139]

In the mentioned cases, the ECtHR seems to have relativized the accessibility (and foreseeability) element of the principle of legality and interpreted it in light of or in the 'spirit' of the rule of law. This seemed fair and right and was the only appropriate action at that time, considering the political systems and the severity of the crimes and the atrocities. However, the ECtHR should be careful with such practices, which can eventually lead to the opposite effect, negatively affecting and relativizing one of the main principles — the non-derogable principle of legality — and consequently undermining the rule of law.

3.3. Article 7. and Preventive Detention as Punishment in the *Case of M. v. Germany*

Another case concerning the foreseeability element is worth mentioning. In the case of *M. v. Germany*,[140] a significant legal precedent concerning preventive detention emerged. M had been subjected to preventive detention for nearly eighteen

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134 ECtHR Judgment, *Streletz, Kessler and Krenz v. Germany,* §§ 77-84; see Derenčinović, *Povodom presude…, op. cit.*, note 130, pp 21-41.

135 ECtHR Judgment, *Vasiliauskas v. Lithuania*, § 159.

136 ECtHR Judgment, *Streletz, Kessler and Krenz v. Germany,* §§ 77-89;.

137 Guide on Article 7, § 44

138 ECtHR Judgment, *Kononov v. Latvia*, §§ 240-244

139 Guide on Article 7, § 44.

140 ECtHR Judgment, *M. v. Germany,* (Appl. no. 19359/04) 17 December 2009 (Final 10.5.2010.); [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22M%20v.%20Germany%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-96389%22]}], Accessed 12 February 2024.

years since 1991, following the completion of his prison sentence.[141] Amendments to the German Penal Code in 1998 allowed for the extension of preventive detention, leading to M's continued confinement. The European Court of Human Rights (ECtHR), as elaborated by *Derenčinović*, observed that there was no direct connection between M's initial conviction and the subsequent ten-year extension of his detention, made possible solely by the 1998 amendments to the German Penal Code.[142] M's continued detention was justified by his perceived threat to public safety, and his attempts to challenge this within the German courts proved unsuccessful. [143] Upon appeal to the ECtHR, the Court overturned the German Federal Constitutional Court ruling regarding the legality of preventive detention. The ECtHR scrutinized the nature of preventive detention, going beyond domestic classifications of its punitive nature.[144] In its analysis, the ECtHR determined that the detention constituted a form of punishment, particularly since it was exclusively applied to individuals convicted of serious crimes. [145] While acknowledging that national systems may utilize preventive detention, the ECtHR emphasized that certain conditions must be met. [146] These conditions included reserving preventive detention as a last resort and ensuring the availability of treatment measures.[147] However, the ECtHR ultimately found a violation of Article 7(1) of the Convention, which pertains to the principle of legality and the prohibition of retroactivity as an element of foreseeability. This ruling underscores the importance of adhering to legal principles and safeguards even in preventive detention.[148]

3.4. Violation of Art. 7. in Misdemeanor Proceedings in the case *Žaja v. Croatia*

The foreseeability element was also not met in one case against Croatia. The case of *Žaja v. Croatia*[149] marked the first instance where the European Court of Hu-

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141 ECtHR Judgment, *M. v. Germany,* §§ 7-16 see also Derenčinović, D., '*Sigurnosno zatvaranje 'opasnih' delinkvenata – podsjetnik iz Strasbourga*', pp 169-180 in: Davor Derenčinović (ed.) Ogledi o pravu i pravdi u dvije Europe- putovi i stranputice europskog kaznenog prava od Strasbourga do Bruxellesa, Narodne novine, Zagreb, 2021, pp 174-177.

142 Derenčinović, *Sigurnosno zatvaranje…, op. cit.*, note 141, p. 176.

143 Farmer, L., *Punishment in the Rule of Law*, *op.cit.*, note 23, p. 455.

144 *Ibid.*, p. 455.

145 ECtHR Judgment, *M. v. Germany,* § 133.

146 Farmer, L., *Punishment in the Rule of Law, op.cit.*, note 23, p. 455.

147 *Ibid.*

148 ECtHR Judgment, *M. v. Germany,* §§ 133-135, see also: Derenčinović, *Sigurnosno zatvaranje…, op. cit.*, note 141, p. 176.

149 ECtHR Judgment, *Žaja v. Croatia,* (Appl. no. 37462/09) 4 October 2016 (Final 04.01.2017); available at: [https://hudoc.echr.coe.int/#{%22fulltext%22:[%22\%22CASE%20OF%20%C5%BDAJA%20v.%20

man Rights (ECtHR) found a violation of the prohibition of arbitrariness in Article 7[150] of the Convention against Croatia in the misdemeanor proceeding.[151] In this case, the applicant had been living in Prague since 2000 and was granted permanent residency in the Czech Republic in February 2008.[152] However, he did not deregister his residence in Croatia. In 2008, the applicant purchased a car in Germany and registered it in his name in the Czech Republic. He then entered Croatia with the car the same year. The police stopped him, confiscated the car, and reported the case to the Customs Administration. The Customs Administration, to enforce customs debt recovery, sold the applicant's car and initiated misdemeanor proceedings against him for violating the rules on temporary importation of foreign goods with full exemption (temporary use of foreign goods in the customs territory of Croatia without paying customs duties). Article 5 of Annex C of the Istanbul Convention on Temporary Admission,[153] specifies that it is about residency (domicile residence), while according to the text of the Decree on the implementation of the Customs Act from 2003,[154] the habitual residence (persons

CROATIA\%22%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-166925%22]}], Accessed 12 February 2024.

150 See also Krapac, D. *et al.*, Z., *Presude Europskog suda za ljudska prava protiv Republike Hrvatske u kaznenim predmetima*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2013.

151 For more see Bonačić; Tomašić, *op. cit.*, note 110, pp 395-396; see also Bonačić, M.; Rašo, M., *Obilježja prekršajnog prava i sudovanja, aktualna pitanja i prioriteti de lege ferenda*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 19, No. 2, 2010, pp 439-472; Derenčinović, D.; Gulišija, M. and Dragičević Prtenjača, M., *Novosti u materijalnopravnim odredbama Prekršajnog zakona*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 20, No. 2, 2013, pp 751-777.

152 For more see Bonačić; Tomašić, *op. cit.*, note 110, pp 395-396.

153 The Istanbul Convention on Temporary Admission of the World Customs Organization, 1990; [https://www.wcoomd.org/en/about-us/legal-instruments/~/media/2D53E23AA1A64EF68B9AC708C6281DC8.ashx], Accessed 2 April 2024; It is effective from June 26, 1990, and in force since November 27, 1993, is an instrument of the World Customs Organization. Temporary importation without payment of customs duties is allowed to minimize border crossing costs and facilitate the free movement of goods across borders. The Istanbul Convention aims to simplify and harmonize temporary importation procedures. According to Article 34(3) of the Istanbul Convention, it is drafted in a single original version in English and French, with both texts being equally authentic.; See Art. 5. Of the Annex C, p. 97.
"The Istanbul Convention entered into force in respect of Croatia on 3 December 1998. It was incorporated into the Croatian legal system by the Government's Decree on Accession to the Convention on Temporary Admission (Uredba o pristupanju Konvenciji o privremenom uvozu, Official Gazette – International Agreements, no. 16/98). The term "persons resident" in Article 5 of Annex C was in the Croatian text of the Istanbul Convention translated on its first occurrence as "osobe s prebivalištem" ("persons having domicile") and on its second occurrence as "osobe koje žive" ("persons living" or "persons who live"). The Croatian version of Article 5 of Annex C to the Istanbul Convention, as published in the Official Gazette – International Agreements (no. 16/1998 of 3 December 1998)…"- ECtHR Judgment, *Žaja v. Croatia*, § 46.

154 The Decree on the implementation of the Customs Act, OG, no. 161/03 with subsequent amendments, which was in force between 1 November 2003 and 30 June 2013; see also ECtHR Judgment, *Žaja v. Croatia*, § 30

having seat)[155] was sufficient.[156] The applicant faced a fine for using a car bought abroad in Croatia, as the Customs Administration determined he wasn't a "person resident" in the Czech Republic. Despite presenting evidence of residency, his arguments were rejected by Croatian courts. The ECtHR found this interpretation of "person resident" unclear and inconsistent, leading to a violation of the legality principle, as the applicant couldn't foresee the offense due to conflicting interpretations and translations of the relevant provision. [157] The diversity in the translation of the key term of the relevant provision and its inconsistent interpretation in the practice of domestic authorities resulted in the applicant, even with legal advice, not needing to foresee that using the vehicle in Croatia would constitute a customs offense at the time of entry into Croatia. This means he could not distinguish between permissible and prohibited behavior with the degree of certainty required by Article 7 of the Convention.[158]

Furthermore, the applicant's conviction in the customs misdemeanor proceedings violated the principle of legality.[159] The ECtHR advised reopening proceedings or a legality review. The government initiated measures to align interpretations with ECtHR rulings, including re-translating relevant provisions. Efforts were made to ensure transparency in court decisions and Convention compliance, forwarded for further examination to ensure compliance with ECtHR judgments.[160]

4. CONCLUSION

The Rule of Law, a concept evolving from ancient legal traditions to modern legal frameworks, underscores the principle that society should be governed by laws

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155 Art. 265(1) of the Decree on the implementation of the Customs Act.

156 „…the Customs Administration consistently held that the term "person resident" referred to in Annex C to the Istanbul Convention was to be interpreted as "persons having habitual residence". In none of these opinions did the Customs Administration refer to the definition of domicile provided in either the Domicile and Residence of Citizens Act or the General Tax Act. Rather, in one of the opinions (opinion of 31 May 2010) it cited the definition of habitual residence provided in the Domicile and Residence of Citizens Act (see paragraph 32 above), whereas in four of the opinions (opinions of 22 November 2012 and of 3, 7 and 10 January 2013) it referred to the definition of habitual residence provided in the General Tax Act (see paragraph 31 above). While in the first of the above-cited opinions (opinion of 19 December 2006) the Customs Administration held that persons having registered domicile in Croatia could not be considered to have habitual residence abroad, in another of the opinions it expressly stated that domicile was irrelevant for determining whether a person had habitual residence (opinion of 15 September 2011)..." ECtHR Judgment, *Žaja v. Croatia*, § 51.

157 For more see Stažnik, Š., *Nullum crimen sine lege* u carinskom prekršajnom postupku, *Informator*, No.. 6473 from 6 May 2017, pp 7, 8.

158 ECtHR Judgment, *Žaja v. Croatia*, § 106.

159 ECtHR Judgment, *Žaja v. Croatia*, § 106.

160 Bonačić; Tomašić, *op. cit.*, note 110, pp 395-398.

rather than arbitrary decisions by individuals. Historically developing through various legal systems and philosophical contributions, this principle culminates in contemporary legal protections such as those outlined in the European Convention on Human Rights. The enduring relevance of the Rule of Law lies in its foundational role in upholding justice, transparency, and equality in democratic societies.

The European Court of Human Rights (ECtHR) plays a vital role in safeguarding human rights and upholding democratic principles within the European Convention on Human Rights (ECHR) framework, especially the rule of law. Central to its mission is promoting the rule of law, incorporating the principle of legality, which includes rule-based governance, adherence to established laws, and ensuring high-quality legislation. While the term "legality" is not explicitly mentioned in the Convention, the ECtHR's jurisprudence emphasizes the importance of this principle and compliance of national laws to this principle and ECtHR-specific quality standards. ECtHR legality can be divided into 'legality' in the border sense (which is to be checked for all rights and freedoms of the ECHR) and legality *stricto sensu,* (in Art. 7, *nullum crimen sine lege)*. Both legalities demand law to be accessible and foreseeable (and, in addition, general, certain, and precise). Accessibility and foreseeability are crucial in the ECtHR's assessment of legality. Laws must be accessible and their consequences foreseeable, with national laws being precise, consistent, and clear. Judicial safeguards are essential, ensuring the application of accessibility and foreseeability, upholding fair trials, and effective remedies. Article 7 of the European Convention on Human Rights (ECHR) is a fundamental element of legality in criminal substantive law, prohibiting punishment without law. Through landmark cases like *Yüksel Yalçinkaya v. Turkey, Streletz, Kessler, and Krenz v. Germany, Vasiliauskas v. Lithuania,* and *Kononov v. Latvia*, the ECtHR has consistently upheld Article 7, ensuring protection against arbitrary prosecution, conviction, and punishment. These cases, along with *M. v. Germany* and *Žaja v. Croatia,* highlight the ECtHR's dedication to scrutinizing the legality of domestic laws, even in complex scenarios like preventive detention and misdemeanor proceedings. By ensuring member states adhere to the principle of legality, the ECtHR protects individual rights and reinforces democracy, justice, and the rule of law.

However, it must be mentioned that the ECtHR, by its interpretation and understanding, has relativized the principles of foreseeability and accessibility as elements of legality in the 'spirit' of the rule of law in some (older) cases. Although it seemed fair at that time to make things just and act as a remedy, it must be noted that such a practice could lead to 'malpractice' and negatively affect the rule of law principle in the future. However, it is commendable that the recent ECtHR case

law goes toward stricter interpretation and adherence to these principles, which is of enormous importance, especially in the legality *stricto sensu* (Art. 7). It can be noticed that the ECtHR case law is like a living being constantly evolving with a purpose to protect human rights and freedoms.

Finally, it can be concluded that the relationship between the ECtHR and the rule of law is symbiotic and unique. The ECtHR and the rule of law are inseparably interconnected. The effect and impact of the ECtHR on the rule of law, and *vice versa*, are amendable and significantly influence each other. When interpreting and applying the ECHR according to its principles, especially the principle of legality (in a broader sense and stricto sensu), the ECtHR acts in accordance with the rule of law principles and simultaneously creates a law that becomes part of the rule of law. It is a circular process of simultaneously applying and making law, and the rule of law.

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2. Judgment, *Del Río Prada v. Spain*, (Appl. no. 42750/09), 21 October 2013
3. Judgment, *Golder v. United Kingdom*, (Appl. no. 4451/70), 21 February 1975
4. Judgment, *Groppera Radio Ag and others v. Switzerland*, (Appl. no. 10890/84), 28 March 1990
5. Judgment, *Grzęda v. Poland* (Appl. no. 43572/18), 15 March 2022
6. Judgment, *Klass and others v. Germany*, (Appl. no. 5029/71), 6 September 1978
7. Judgment, *Kononov v. Latvia*, (Appl. no. 36376/04), 17 May 2010
8. Judgment, *M. v. Germany,* (Appl. no. 19359/04) 17 December 2009 (Final 10.5.2010.)
9. Judgment, *S.W. v. the United Kingdom*, (Appl. no. 20166/92), 22 November 1995,
10. Judgment, *Vasiliauskas v. Lithuania*, (Appl. no. 35343/05), 20 October 2015
11. Judgment, *Yüksel Yalçinkaya v. Turkey*, (Appl. no. 15669/20), 26 September 2023
12. Judgment, *Žaja v. Croatia,* (Appl. no. 37462/09) 4 October 2016 (Final 04.01.2017)