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ESTUDIOS

THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS AS AN INSTRUMENT TO COUNTER THE RULE OF LAW BACKSLIDING IN NATIONAL LEGAL SYSTEMS (SOME DOCTRINAL REFLECTIONS)

La Jurisprudencia del Tribunal Europeo de Derechos Humanos como instrumento para contrarrestar el retroceso del Estado de Derecho en los ordenamientos jurídicos nacionales (Algunas reflexiones doctrinales)

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Abstract

The interaction between states and European interstate organizations has taken on a new dimension: through purely domestic doctrine the Rule of Law idea becomes standardised using European informal law-making. The current paper analyses how the European Court of Human Rights can modernise and develop the content of the Rule of Law. This paper offers two main contributions to theoretical legal thought. First, it pinpoints the necessity to conceptualise the meaning and content of the Rule of Law via the instruments of judicial interpretation. Being incorporated in every article of the European Convention, the Rule of Law is interpreted by the Strasbourg Court with the aid of a “living instrument approach”. Second, this article categorises the difference between two main structural levels of the Rule of Law: its principles and their requirements. This allowed the author to build a Rule of Law anti-backsliding “reference system” that is designed in a way that is directly based on judgments

rendered by the Court. It is argued that this may be useful for state legal systems as through its jurisprudence, the Court has developed a robust framework for assessing whether a member state violates the Rule of Law standards. The suggested framework has been used to hold member states accountable for their actions and to prevent any backsliding of the Rule of Law in Europe.

Keywords

Rule of Law, European Court of Human Rights, National Legal Systems, Judicial Review, Rule of Law Backsliding.

Resumen

La interacción entre los Estados y las organizaciones interestatales europeas ha adquirido una nueva dimensión: a través de la doctrina puramente nacional, la idea del Estado de Derecho se normaliza utilizando la elaboración de leyes informal europea. El presente artículo analiza cómo el Tribunal Europeo de Derechos Humanos puede modernizar y desarrollar el contenido del Estado de Derecho. Este trabajo científico ofrece dos contribuciones principales al pensamiento jurídico teórico. En primer lugar, señala la necesidad de conceptualizar el significado y el contenido del Estado de Derecho a través de los instrumentos de interpretación judicial. Al estar incorporado en cada artículo del Convenio Europeo, el Estado de Derecho es interpretado por el Tribunal de Estrasburgo con la ayuda de un “enfoque de instrumento vivo”. En segundo lugar, este artículo clasifica la diferencia entre dos niveles estructurales principales del Estado de Derecho: sus principios y sus requisitos. Esto permitió al autor construir un “sistema de referencia” antirretroceso del Estado de Derecho, diseñado en base directa de las sentencias dictadas por el Tribunal. Se argumenta que esto puede ser útil para los sistemas jurídicos nacionales, ya que, a través de su jurisprudencia, el Tribunal ha desarrollado un marco sólido para evaluar si un Estado miembro viola las normas del Estado de Derecho. El citado marco se ha utilizado para que los Estados miembros rindan cuentas de sus actos y se evite cualquier retroceso del Estado de Derecho en Europa.

Palabras clave

Estado de Derecho, Tribunal Europeo de Derechos Humanos, Sistemas Jurídicos Nacionales, Revisión Judicial, Retroceso del Estado de Derecho.

Summary: I. INTRODUCTION. II. THE ECtHR'S FIDELITY TO THE RoL PRINCIPLE: A CASE OF THE "LIVING INSTRUMENT" APPROACH. III. THE RoL AS A SET OF ELEMENTS AND THEIR REQUIREMENTS: PERSPECTIVE FOR THE SYSTEMATIZATION. 1. Developing an Elemental Framework for Conceptualizing the RoL as a Principle of Complex Nature. 2. Extracting the RoL Elements from the Court's Judgments: Streamlining of Certain Anti-Backsliding Standards for Europe. IV. CONCLUDING REMARKS. V. BIBLIOGRAPHY.

I. INTRODUCTION

The declaration of the Rule of Law (hereinafter referred to as the RoL) as the principle that functions at both international and national levels has spawned a vast discussion on how its normative content may be influenced by international legal practice and be implemented subsequently into the relevant national legal order. Most scientific publications to date have focused on the issues of how integration institutions like the EU elaborate and interpret the RoL idea.¹

However, less attention has been paid to the development of RoL in the framework of the European Court of Human Rights (hereinafter referred to as the Court or the ECtHR). Factually, there are only a few works devoted directly to the aforementioned topic of research. Specifically, Lautenbach's book is geared toward the broad spectrum of the RoL's shades in the relevant Court's practice, including its role in the interpretation of universal human rights clauses.² Steiner's investigation is also focused on such issues and the like but with special reference to its mission to act as the underlying principle of any society that is considered democratic.³ Other scholars use overly

¹ For an overview on the various approaches used to reflect the nature of RoL at the level of international organizations, see, for example, Oliver Mader, "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law," *Hague Journal on the Rule of Law* 11, (December 2018): 141; Carlos Closa, "Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations," In *Reinforcing Rule of Law Oversight in the European Union*, edited by Carlos Closa and Dimitry Kochenov (Cambridge: Cambridge University Press, 2016), 19–21; Theodore Konstantinides, *The Rule of Law in the European Union: The Internal Dimension* (London: Bloomsbury Publishing PLC, 2017), 41–44.

² Geranne Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights*. (Oxford: Oxford University Press, 2013), 3–9.

³ Elisabeth Steiner, "The Rule of Law in the Jurisprudence of the European Court of Human Rights," In *Strengthening the Rule of Law in Europe: From a Common Concept*

narrow approaches to examine RoL development within the Court's jurisprudence. J. L. Černič, for instance, has presented results on the role of the Court's interpretation in the development of the Central and Eastern European regions.⁴ These scholarly writings have certainly inspired qualitatively new areas of doctrinal conceptualization regarding RoL. However, in this paper, I contribute a different dimension to the current academic debates about the RoL internalization discourse.⁵ Specifically, what is the core of the ECtHR's practice in the upholding of the Rule of Law's *raison d'être*, and how its doctrines and approaches can potentially help to overcome the RoL backsliding practices within European legal space.⁶

In particular, the current research notes adopt both analytical and to some extent legally reconstructive approaches to the RoL as the principle of complex nature. The latter means that in the ECtHR's interpretative activity, the RoL's substantial content becomes standardized. Judicial interpretation serves not only as the instrument for the protection of fundamental human rights.⁷ Such activity should be construed as a specific direction in informal law-making, the output of which is in the creation of internationally accepted RoL standards.⁸ In turn, such standards are standards in the sense that they

to *Mechanisms of Implementation*, ed. Werner Schroeder (Oxford: Hart Publishing, 2016), 140–48.

⁴ Jernej Letnar Černič, "Impact of the European Court of Human Rights on the Rule of Law in Central and Eastern Europe," *Hague Journal on the Rule of Law* 10, (April 2018): 113–15.

⁵ For more information on the concept of "internationalized rule of law", please, find Andre Nollkaemper, "The Bifurcation of International Law: Two Futures for the International Rule of Law," *The Law of the Future and the Future of the Law*, 2011–05 (April 2011): 3–5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1825976.

⁶ Within the scope of this paper, under the term "rule of law backsliding" I will understand the erosion or weakening of legal norms, institutions, and practices that ensure that the exercise of government power is based on a set of clear, predictable, and fair legal rules. It can occur in different forms, including the erosion of civil liberties, the restriction of access to justice, the politicization of the judiciary, the abuse of power by government officials, and the undermining of democratic checks and balances.

⁷ In the sense that the Court may provide competing interpretations on Convention's articles, thus creating particular normative models for the legal regulation of certain social relationships.

⁸ In contrast to the traditional international law-making, Ramses A. Wessel elaborates the concept of informal law-making. The main idea is that informal international law-making is a flexible way to produce legal norms that are regarded to form the corpus of soft law. See: Ramses A Wessel, "Informal International Law-Making as a New Form of World Legislation?," *International Organizations Law Review* 8, 1 (January 2011): 256–59, doi: <https://doi.org/10.1163/157237411X594209>. In that spirit, I am of the opinion that ECtHR's law-making activity is informal in the sense that in certain Court's judgments, RoL standards are laid down, but they do not appear in the form of strict rules.

may be employed as special landmarks and indicators in strengthening national RoL variations.⁹ It is believed, the chosen Eurocentric approach will allow legal scholars and practitioners to rethink mechanisms of convergence and legal acculturation of national legal systems in terms of approximation to certain international RoL standards, thus eliminating potential or real-life cases of RoL backsliding.

The outlined scope of the article as well as existing empirical material make it possible to argue that the overall purpose of the suggested investigation is twofold. First, conceptualizing this principle from the standardization perspective shall prove interesting for legal practitioners engaged in what Kleinfeld calls “rule of law ends”.¹⁰ Second, this paper intends to address not so much the issues related to the challenges and limitations that the Court faces in its activity, but rather the role of this institution in fostering and developing gradual and “anfractuous” crystallization of the RoL constituent parts.

It is therefore possible to form a reasonable hypothesis of the suggested research: a substantial content of the RoL is comprised of the certain international legal standards that are constantly emerging from the ECtHR’s “living instrument” approach. As a result, they can directly or indirectly influence legal systems in terms of modification of national versions of the investigated principle.

Such a complex hypothesis is to be developed in two main steps. First of all, I address the issue of the ECtHR’s approach to the RoL practical elaboration. Under that objective, I distinguish several dimensions (analyzed from the Court’s case law) within which the RoL principle is conceptualised. Then, I explore relevant ECtHR decisions to prove this principle has a meta-legal character. Focusing on this aspect, it will be shown that the RoL could be seen as a non-hierarchical system of interconnected principles with further concretisation in the form of special requirements. The latter concurrently establish a coherent system of the RoL European anti-backsliding standards.

Indeed, these standards are a “cumulative” form of materialization of special axiological determinants that establish RoL normative structure.

⁹ Olga Burluk, “Variation in EU External Policies as a Virtue: EU Rule of Law Promotion in the Neighbourhood,” *JCMS: Journal of Common Market Studies*, 53(3) (October 2014): 512–13, <https://doi.org/10.1111/jcms.12216>.

¹⁰ Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners* (Washington, D.C.: Carnegie Endowment for International Peace, 2005), 7.

II. THE ECtHR'S FIDELITY TO THE ROL PRINCIPLE: A CASE OF THE "LIVING INSTRUMENT" APPROACH

As the observant reader probably noted, traditional sources of European law, albeit static in their content, can be interpreted proactively, that is with special reference to extensive development in the regulation of social relations. Such an approach to interpretation has become known as "evolutive" or "dynamic".

In the context of ECtHR's decision-making, the evolutive method is considered to serve as the gold standard in protecting the fundamental human rights enshrined in the Convention. As Dzehtsiarou notes in his article, being a "*tool that keeps the meaning of the rights both contemporary and effective*", ECtHR's evolutive interpretation makes the Convention a "living instrument" as it allows analysing and translating its provisions following the present political and socio-economic contexts. Logically, in case the Court will apply human rights standards, the meaning and connotation of which remain unchanged, international law sources will become the instruments of stagnation.¹¹

Clearly, the Convention remains a central source of human rights advocacy all over Europe, as its provisions are by definition long. However, the content of the fundamental rights that comprise the "Convention's cells" has evolved substantially, notably with new means of realization which were unknown at the time of the Convention's adoption. Therefore, the method of dynamic interpretation precludes the scope of inviolable human rights from being locked into legal practices of the past. In other words, Convention should be interpreted by taking into account the evolution of the global legal system, in addition to changes that are constantly occurring in the present day. Admittedly, the application of this interpretational approach renders the Convention a "living instrument". The concrete meaning of the latter, particularly, should be provided with this extract from the ECtHR's judgment. In the landmark case of *Tyrer v. United Kingdom*, the Court stated in full:

*"The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it, the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field. [...]"*¹²

¹¹ Kanstantsin Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights," *German Law Journal* 12, no. 10 (October 2011): 1730, doi:10.1017/S2071832200017533.

¹² *Tyrer v the United Kingdom*, 15 March 1978, § 31, Series A no. 26.

So far, this remains a rather simple explanation of the mutual influence exerted by different levels of the global legal order, but it points clearly to the idea of intrinsic linkage between fundamental human rights and the RoL.¹³ It is not surprising, therefore, that these values are interdependent. From one side, the quintessence of the RoL lies in the protection of individual's rights from coercive and arbitrary state power.¹⁴ On the other hand, the RoL as an important social value can only exist in states where adherence to the universally recognised human rights standards is deemed a vital part of constitutional order.

This complex interdependence indicates that the RoL is of an objective nature while fundamental human rights are rather subjective. Particularly this means that the RoL's main purpose (to protect individuals from the state's unlawful conduct) remains universal as it exists independently of any state's political will. RoL's normative content inherently contains an obligation within which the state and its governmental authorities are limited in their discretionary activity, especially toward human rights issues. In contrast, fundamental human rights are of a subjective nature in the sense that the end-result of their effectiveness is directly dependent upon the state's activity in their legal consolidation, implementation, and protection. To exercise a particular right means that by itself this right is fully personalised, hence elevating the human being to its role as the centerpiece of the state's existence.

That is why it is so important to reveal the RoL normative development along with the Court's evolutive interpretation of the Convention since it is aimed at the protection of basic human rights that are violated at the national level. Being a human rights guardian, the ECtHR is designed to find the gaps in the national RoL doctrines that are intended to protect individuals according to specific domestic contexts. Within the evolutive approach, it is possible to detect and normatively define particular RoL "working definitions" while interpreting the scope of the rights incorporated in the Convention articles. Admittedly, without the evolution of its construction, the RoL could not perform its function merely as the "*useful tool for the Court assisting it in interpreting, supplementing and enhancing the protection standards set out in the Convention*".¹⁵

¹³ Norman Weiß, "Rule of Law as a Basis for Effective Human Rights Protection: The German Perspective," In *The Universalism of Human Rights. Ius Gentium: Comparative Perspectives on Law and Justice*, vol 16, ed. Reiner Arnold (Dordrecht: Springer, 2013), 262–63.

¹⁴ Brian Z. Tamanaha, "A Concise Guide to the Rule of Law," In *Florence Workshop on the Rule of Law*, no. 07-0082, no. 07-0082 (September 2007): 9, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012051.

¹⁵ Steiner, "The Rule of Law in the Jurisprudence of the European Court of Human Rights," 139.

Nevertheless, in its decisions, ECtHR repeatedly pointed out that the RoL principle is inherently incorporated into every article of the Convention.¹⁶ Thereby, its very idea is rightfully represented as the common heritage of the European community as it is a concept “[...] *from which the whole Convention draws its inspiration*”.¹⁷

Against this backdrop, there can be many ways of viewing and defining the ECtHR’s variation of the RoL. Investigating the Court’s jurisprudence, some authors tend to reflect this principle via the concept of a “reasonable minimum core of socio-economic rights”. For example, according to Čerňič, the normative content of the RoL is comprised of a set of elements reflecting not only civil and political but also socio-economic rights as they derive from the same external set of fundamental values.¹⁸ Such a reasonable approach allows one to argue that the scope of the development of RoL standards is not limited to certain categories of human rights. Quite the contrary: if the RoL is elaborated as a set of legal and moral standards aimed at ensuring and protecting fundamental human rights, the understanding of the interpretation of the Convention is that it serves as a means to expand the normative structure of this principle by the development of new substantive nuances of its content.¹⁹

The analysis provided below of the Court’s case law will demonstrate the importance of using the evolutive method to substantially develop the RoL, as the Court in this instance acts as a special informal law-making authority.²⁰ Particularly, the latter means that the ECtHR is considered to be a “constitutional court” in the sense that its judgments are delivered within the basis of European consensus doctrine.²¹ To this end, the Court can determine which

¹⁶ *The Former King of Greece and Others v. Greece*, no 25701/94, § 79, ECHR 2000-XII; *Mangir and Others v The Republic of Moldova and Russia* (final), no 50157/06 § 36, 3 December 2018.

¹⁷ *Engel and Others v The Netherlands*, 8 June 1976, § 69, Series A, no. 22.

¹⁸ Letnar Jernej Čerňič, “The European Court of Human Rights, Rule of Law and Socio-Economic Rights in Times of Crises,” *Hague Journal on the Rule of Law*, no. 8(2) (September 2016): 235.

¹⁹ Brian Z. Tamanaha, “The History and Elements of the Rule of Law.” *Singapore Journal of Legal Studies*, (2012): 234. <http://www.jstor.org/stable/24872211>.

²⁰ Armin von Bogdandy, and Venzke Ingo, “Beyond Dispute: International Judicial Institutions as Lawmakers,” *German Law Journal* 12, no. 5 (2011): 989–993, doi:10.1017/S2071832200017193.

²¹ Robert Harmsen, “The European Court of Human Rights as a ‘Constitutional Court’: Definitional Debates and the Dynamics of Reform,” In *Judges, Transition and the Human Rights*, eds. John Morison, Kieran McEvoy, and Gordon Anthony (Oxford: Oxford University Press, 2007), 33–34.

^Recent papers on European consensus issues show that this doctrine used by the ECtHR reflects the shared vision and framework for further actions in the development of unified and policy coherent protection of basic human rights. Within the RoL perspective,

RoL aspects need to be strengthened to reflect the above-cited European consensus among national legal systems and, accordingly, to prevent or at least minimise the risks of RoL backsliding.

III. THE RoL AS A SET OF ELEMENTS AND THEIR REQUIREMENTS: PERSPECTIVE FOR THE SYSTEMATIZATION

1. *Developing an Elemental Framework for Conceptualizing the RoL as a Principle of Complex Nature*

In the majority of cases, the Court refers in its judgments to certain aspects of the RoL. Therefore, there is a question of some lexical diversification that exists in relevant legal texts. Namely, in some of its judgments, the ECtHR uses such word combinations as the “basic element of the rule of law”. For example, in the case *Baranowski v. Poland* the Court pointed out the following:

*“Secondly, the Court considers that the practice which developed in response to the statutory lacuna, whereby a person is detained for an unlimited and unpredictable time and without his detention being based on a concrete legal provision or on any judicial decision is in itself contrary to the principle of legal certainty, a principle which is implied in the Convention and which constitutes one of the basic elements of the rule of law”.*²²

Sometimes the Court used another wording to identify the RoL’s structural unit, notably its requirements:

*“The Court further notes that – as was the situation in the present case – there are divergences in the case law of the courts as regards, in particular, the question whether the application of Sharia law is compatible with the principle of equal treatment and with international human rights standards. Such divergences exist among courts of the same judicial branch, as well as between the Court of Cassation and the civil courts (see paragraphs 51-53 above) and between the Court of Cassation and the Supreme Administrative Court (see paragraph 44 above), but also within the Court of Cassation itself (see paragraph 47 above). The divergences create legal uncertainty, which is incompatible with the requirements of the rule of law [...]”.*²³

this concept is especially useful as it provides a means to legitimise the Court’s judgments not only for States to which they have been addressed, but also as the soft law instruments for the other countries in Europe, the judicial protection systems of which to some extent are outdated and need to be improved.

²² *Baranowski v Poland*, no 28358/95, § 56, ECHR 2000-III.

²³ *Molla Sali v Greece* (just satisfaction) [GC], no 20452/14, § 153, 19 December 2018.

Alongside this, in judicial texts, one can find more variations about designating other aspects of the RoL, particularly its “principles”. In the case *Zubac v. Croatia* the following was highlighted:

*“The right of access to a court was established as an aspect of the right to a tribunal under Article 6 § 1 of the Convention in Golder v. the United Kingdom (21 February 1975, §§ 28-36, Series A. no. 18). In that case, the Court found the right of access to a court to be an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlay much of the Convention. Thus, Article 6 § 1 secures to everyone the right to have a claim relating to his civil rights and obligations brought before a court [...]”*²⁴

With this in mind, a question arises: Are there any connotative differences between the phrasal choices enumerated above? I would assert yes. Unfortunately, neither RoL legal thinkers nor practitioners have yet elaborated any methodological grounds for the outlined distinction. Regardless, I will try to provide background reasons for why it is necessary to classify and differentiate between the RoL elements, principles and requirements.

There is a general rule that the structural components of any legal phenomenon should be divided according to the internal properties they are endowed with. In doing so, although performing distinct functions, such components are interlinked via substantial relationships to ensure proper target determination of a given phenomenon.²⁵

Contextual analysis of the Court’s judgments as suggested above clearly indicates that within the evolutive interpretation, the RoL is represented as the complex legal construction, itself subdivided into several structural units. It seems to me that each time the Court refers to a RoL element, principle, or requirement, it intends to show various aspects of the RoL internalization. In any case, an understanding of the content of the RoL elements and principles should not be identical to the content of its requirements.

The RoL elements are generic terms towards its principles. Being united according to certain criteria, RoL elements can be either formal or substantial. Thus, each type of element can be considered a system of interconnected principles. The identification of the RoL elements as a more or less coherent system of certain principles provides for a detailed description of their true sense. The latter is accompanied by the formulation of specific requirements established by the Court to show the concrete problem in the RoL adherence

²⁴ *Zubac v Croatia* [GC], no 40160/12, § 76, 5 April 2018.

²⁵ Jerome Hall, “Some Basic Questions Regarding Legal Classification for Professional and Scientific Purposes,” *Journal of Legal Education* 5, no. 3 (1953): 330–31. <http://www.jstor.org/stable/42890689>.

by a particular domestic legal system. Inherently, those requirements are designed to effectively reveal the content of the RoL's certain principles. At the same time, they can be put forward to the specific national legal system so that a separate structural part of the RoL principle is improved and thus can be operated within that unique political and legal environment. Yet conversely, the RoL requirements in their functional direction are much narrower than their principles. They can acquire individual manifestations within the framework of the particular RoL principle. That is, the emergence of a list of requirements in any case directly depends on the level of backsliding the certain RoL principle. In their content, such requirements are turned towards the prospects for the development of certain ideas imposed by the RoL principle.

Hence, when the Court refers to the RoL requirements, it intends to emphasize the relationships of coordination between European and national legal orders. I believe the RoL requirements shape a request for rethinking the goals and objectives of domestic legal regulation, as well as the tasks pursued by the national legal system (or its separate parts). Objectively, they act as axiological reference points in the interaction of national legal systems with the legal system at the European level.

In essence, in the first case, we are talking about the development or improvement of a certain RoL principle as its elements that can be considered as a result of the Court's informal law-making power. Otherwise, when the ECtHR refers to a specific violation of fundamental human rights, the contextual message comes precisely with the RoL requirements. This, as it seems, is an expression of the Court's exercise of its direct function – monitoring the observance of natural human rights, or protecting and restoring them in case of violation by the state. In giving this caveat, I think that by their legal nature, the RoL principles are prescriptive; that is, they form the internal structure of the RoL as a “meta-legal” and complex principle. And the requirements are essentially descriptive, that is, they are systematically written out from the teleological tasks that are specific to a certain RoL principle. Requirements express the objective qualities of a certain RoL element. For instance, for access to justice as one of the elements of the RoL, there can be articulated such requirements as the requirement to ensure the rights to a fair trial, the requirement to provide free legal aid, etc.

Against this background, I believe that the elements form the normative environment for the RoL as a concept with precise content and not simply as an abstract declarative idea. In contrast, RoL requirements are the specified options that are qualitative indicators used to define “blind spots” in the RoL practical implementation by state authorities. They can be otherwise known as the conditions needed to be observed to respect the RoL and not to backslide it. Together, they can be represented as the RoL anti-backsliding standards.

All these methodological arguments make it possible to develop a specific “reference system” of the RoL anti-backsliding standards. I believe the establishment of the RoL list of components will facilitate the socialization of legal norms. Namely, this takes place when the national legal orders (as one of the key European law-making addressees) extract and adapt the RoL anti-backsliding standards that are produced at the level of certain legal relations. Prominently, this is accompanied by the process of diffusion of legal norms (legal diffusion).²⁶ The effect of this process can be detected not only in national judicial practice but also in domestic legal engineering.

2. *Extracting the RoL Elements from the Court’s Judgments: Streamlining of Certain Anti-Backsliding Standards for Europe*

Before depicting certain RoL “reference system”, explaining which criteria were used to make such systematization is of utmost importance. It is not a secret that being of common European heritage, the investigated concept ideologically pervades the whole text of the Convention. For this reason, some RoL principles are less obvious from the Convention’s article, and, accordingly, principles that can be directly drawn from its text.

However, I was guided mostly by the contextual search (using keywords like “rule of law element(s)” or “rule of law principle(s)”) in the Court’s case-law database. This means that in my examination I was not limited to the particular time frame, geopolitical context, or specific type of legal dispute that was addressed by the ECtHR. The absence of any constraints allowed me to identify to some degree an extensive set of anti-backsliding standards that could be incorporated into the RoL legal construction, thus characterizing it as a meta-legal principle.

Another important moment is that although the Court may refer to the “rule of law requirements”, their true essence is revealed within the teleological interpretation. Recourse to this method was of primary importance to me for one reason. It has enabled me to extract from the Court’s motivation part of its judgment a direct RoL requirement that was formulated by the Court to show concrete formal and substantial properties with which a particular domestic legal system (or some of its structural units) should be reconciled.

²⁶ To avoid ambiguity in this term’s meaning, the approach suggested by M. Solinas will be employed. Namely, diffusion of RoL international standards can be defined as the elaboration of “legal transplants”, that is, legal standards transplanted from the supranational level to the level of national legal system. In this regard see: Solinas, Matteo. “The Debate on the Diffusion of Law,” In *Legal Evolution and Hybridisation*, ed. Matteo Solinas. IUS Commune: European and Comparative Law Series. (Brussels: Intersentia, 2014), 7–22. doi:10.1017/9781780685359.004.

Against this backdrop, the suggested anti-backsliding “reference system” may include the following RoL elements and requirements that are stemmed from them:

1. Principle of legality. In most cases, each Court’s judgment, revealing the nature of legality directly explicates its content via certain requirements: requirement of supremacy of law means the law as a legal act ranked first in the hierarchy of national law sources; among the most essential aspects of this requirement is that all actions of both state authorities and citizens should be in conformity with the national laws;²⁷ requirement of non-retroactive application of the law (the requirement of prohibition of retroactive legislation) means that only the law can define a crime and prescribe a penalty; this additionally presupposes that the criminal law must not be extensively construed to the accused’s detriment, for instance by analogy;²⁸ requirement of clear predictability of the norms of positive law, which means that every state shall be constituted with the clear legislative frameworks; in its turn, there should be a clearly drafted legal provision which is considered to be an inevitable element of judicial interpretation;²⁹ requirement for a clear and unambiguous delimitation of the restrictions that may be imposed on human rights implementation, that is “necessary in a democratic society in the interests of public safety and for the prevention of disorder and crime”.³⁰

2. Principle of legal certainty can be revealed via the following traditional requirements: requirement of sufficiently clear and foreseeable national legislative framework;³¹ this requirement is closely linked with the issue of deprivation of liberty and the State’s ability to conform to the standards of lawfulness;³² requirement to ensure a certain stability in legal situations; this means that one of the most important aspects of legal certainty that the law should not be changed unexpectedly;³³ this requirement is believed to be essential as it maintains the public confidence in the doestic law, mainly due to the fact that stability in legal situations directly results from the consistency of the law and coherence of courts judgments, respectively;³⁴

²⁷ *Capsky and Jeschkeova v The Czech Republic* (just satisfaction), nos. 25784/09 and 36002/09, § 22, 9 February 2017; *Cervenka v Czech Republic* (final), no 62507/12, § 105, 13 January 2017.

²⁸ *Baka v Hungary* [GC], no 20261/12, §55, 23 June 2016.

²⁹ *Maestri v Italy* [GC], no 39748/98, §§ 6, 26, 29, ECHR 2004.

³⁰ *Enea v Italy*, no 74912/01, §§ 34, 131, ECHR 2009.

³¹ *Lupeni Greek Catholic Parish and Others v Romania*, no 76943/11, § 108, 29 November 2016.

³² *Khlaifia and Others v Italy* [GC], no 16483/12, § 92, 15 December 2016.

³³ *Hutten-Czapska v Poland* [GC], no 35014/97, § 171, 19 June 2016.

³⁴ *Centre for Legal Resources on Behalf of Valentin Campeanu v Romania* [GC], no 47848/08, § 14, ECHR 2014.

requirement according to which the positions of the persons concerned in particular situation should not remain unregulated for any period of time;³⁵ requirement of ensuring that judicial cases raising issues under the Convention should be examined within a reasonable time, thus preventing the authorities and other persons concerned in particular situation from being kept in a state of uncertainty for a long period of time;³⁶ requirement that where the courts have finally determined an issue, their ruling should not be called into question;³⁷ requirement of accessibility of law, which entails the State's obligation to create all the conditions necessary for the citizens to gain an access to any law;³⁸ for instance, in Case of *De Tommaso v. Italy*, ECtHR has outlined in General principles that 'the Court reiterates its settled case-law, according to which the expression "in accordance with law" [...] also refers to the quality of the law in question, requiring it should be accessible to the persons concerned";³⁹ requirement to follow the doctrine of legitimate expectations; depending on different shades of the cases, the Court has been considered this is endowed with quite various aspects of understanding; namely, in some cases, the persons concerned were entitled to rely on the fact that the legal act on the basis of which they had incurred financial obligations would not be retrospectively invalidated to their detriment; against this backdrop, the concept of legitimate expectation is thus based on a reasonably justified reliance on a legal act which has a sound legal basis and which bears on property rights.⁴⁰

3. Principle of avoidance of arbitrariness and abuse of power includes the requirements of the following nature: the requirement to provide guarantees against the arbitrariness of state authorities; the requirement of clear and limited granting of discretionary powers; which means the national legal system should indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise;⁴¹ requirement to ensure the lawfulness and reasonableness of the decisions taken by the state authorities;⁴² requirement of the ability of the national governments to ensure

³⁵ *Kuric and Others v Slovenia* [GC], no 26828/06, § 15, ECHR 2012.

³⁶ *Radomilja and Others v Croatia* [GC], nos 37685/10 and 22768/12, § 118, 20 March 2018.

³⁷ *Brumarescu v Romania* [GC], no 28342/95, § 61, ECHR 1999.

³⁸ *Svinarenko and Slyadnev v Russia* [GC], nos 32541/08 and 43441/08, § 124, ECHR 2014.

³⁹ *De Tommaso v Italy* [GC], no 43395/09, § 106, 23 February 2017.

⁴⁰ *Kopecky v Slovakia*, no 44912/98, §§ 45–47, ECHR 2004-IX.

⁴¹ *S. and Marper v The United Kingdom* [GC], nos 30562/04 and 30566/04, §§ 95, 96, ECHR 2008.

⁴² *Khlaifia and Others v Italy* [GC], no 16483/12, §§ 86,88, 15 December 2016.

measures of legal protection against arbitrary interferences by public authorities;⁴³ requirement to establish the mechanisms of the accountability of the public authorities;⁴⁴ requirement to maintain the consistent interpretation of domestic law by the national courts.⁴⁵

4. Principle of separation of powers is comprised of: the requirement of the optimal self-regulation mechanisms which would include a system of checks and balances;⁴⁶ the requirement to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction.⁴⁷

5. Principle of proportionality provides for the following requirements: requirement according to which the severity of the penalty in criminal law must commensurate with the seriousness of the offence;⁴⁸ requirement according to which the measures taken by administrative authorities (executive) must be proportionate to the objective to be achieved.⁴⁹

6. Principle of effective justice may be considered the most complex and multilayered RoL element. Thus, it is appropriate to distinguish some clusters in the systematization of RoL requirements about this element.

Institutional requirements envisage: general requirement to ensure the right of access to a court, which must be practical and effective; particularly, it is manifested in the fact that individual must have a clear, practical opportunity to challenge an act that interferes with his/her rights;⁵⁰ requirement to create and facilitate the functioning of courts "established by law"; specifically, such a formulation presupposes that a national legal system comprises in particular the legislation on the establishment and the legislation on the competence of judicial organs;⁵¹ in this context, in particular, it entails provisions concerning the independence of the members of a tribunal, the length of their term of office, impartiality and the existence of procedural safeguards, thus presupposing not only the legal basis for the very existence of a "tribunal" but also compliance by the tribunal with the particular rules that

⁴³ *Belane Nagy v Hungary*, no 53080/13, § 78, 13 December 2016.

⁴⁴ *El-Masri v The Former Yugoslav Republic of Macedonia* [GC], no 39630/09, § 23, ECHR 2012.

⁴⁵ *G.I.E.M. S.R.L. and Others v Italy* [GC], nos 34163/07, 19029/11 and 1828/06, § 31, 28 June 2018.

⁴⁶ *Natsvlishvili and Togonidze v Georgia*, no 9043/05, § 88, ECHR 2014.

⁴⁷ *Ramos Nunes De Carvalho E Sa v Portugal* [GC], nos 55391/13, 57728/13 and 74041/13, § 145, 6 November 2018.

⁴⁸ *Bedat v Switzerland*, no 56925/08, § 79, 29 March 2016.

⁴⁹ *Prince Hans-Adam II of Liechtenstein v Germany* (merits), no 42527/98, § 44, ECHR 2001-VIII.

⁵⁰ *Bellet v France*, no 23805/94, § 36, ECHR A333-B.

⁵¹ *Jorgic v Germany*, no 74613/01, § 64, ECHR 2007-III.

govern it;⁵² requirement, in accordance with which a case must be heard by an independent and impartial tribunal; this requirement is comprised of two interrelated sub-requirements – the independence of the judiciary and its impartiality; the first directly reflects the necessity to establish both formal and substantive guarantees on the court's independence from the other branches of power;⁵³ the second sub-requirement assumes that tribunal must function without a prejudice or bias;⁵⁴ requirement to provide reasonable court fees.⁵⁵

Procedural requirements are comprised of: requirement to formulate clear admissibility criteria for an appeal;⁵⁶ requirement to avoid excessive formalism that would infringe the fairness of the proceedings;⁵⁷ requirement to ensure the right of a fair trial, which primarily manifested in the requirement that litigants should have an effective judicial remedy enabling them to assert their fundamental rights;⁵⁸ requirement to ensure proper administration of justice means that there should be a diligent and proper conduct of the proceedings along with the careful implementation of the relevant procedural rules;⁵⁹ requirement to administer justice without delays, that is, the requirement of reasonable time; this requirement presupposes that domestic legal system must provide all necessary legal instruments and institutional capabilities necessary to organize its judicial system in such a way that the national courts are able to guarantee everyone's right to a final decision on disputes concerning rights and obligations within the reasonableness of the length of proceedings.⁶⁰

Special requirements are linked with the special guarantees provided for the individual to benefit from the right to a fair trial: requirement to establish a legal aid system which may offer individuals the substantial guarantees to protect them from arbitrariness;⁶¹ in order to comply with this requirement, the national legal system must provide the independence of the legal profession from the state;⁶² requirement to organize effective system of judicial decisions enforcement; primarily, this is necessary in order to prevent an unreasonably long delay in enforcement of a binding judgment; notably, in

⁵² *DMD Group, A.S. v Slovakia*, no 19334/03, § 59, ECHR 2011.

⁵³ *Henryk Urban and Ryszard Urban v Poland*, no 23614/08, § 45, ECHR 2011.

⁵⁴ *Micallef v Malta* [GC], no 17056/06, § 93, ECHR 2009.

⁵⁵ *Podbielski and PPU Polpure v Poland*, no 39199/98, § 69, ECHR 2005.

⁵⁶ *Maresti v Croatia*, no 55759/07, § 33, ECHR 2009.

⁵⁷ *Lukenda v Slovenia*, no 23032/02, § 45, ECHR 2005-X.

⁵⁸ *Cudak v Lithuania* [GC], no 15869/02, § 54, ECHR 2010.

⁵⁹ *Zubac v Croatia* [GC], no 40160/12, § 119, 5 April 2018.

⁶⁰ *Comingersoll S.A. v Portugal* [GC], no 35382/97, § 24, ECHR 2000.

⁶¹ *Del Sol v France*, no 46800/99, § 26, ECHR 2002.

⁶² *Orlov v Russia* (merits and just satisfaction), no 29652/04, § 108, ECHR 2011.

Case of *Hornsby v. Greece* the Court has underlined that the “right to a court” will be illusory if a national legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party; execution of a judgment given by any court must therefore be regarded as an integral part of the “trial” for the purposes of Article 6 of the Convention;⁶³ accordingly, an unreasonably long delay in enforcement of a binding judgment may therefore breach the Convention.⁶⁴

7. Principle of equality and non-discrimination generally includes following requirements: requirement of the equal treatment of individuals;⁶⁵ this may presuppose requirement, according to which all legal privileges and exceptions are based on a legitimate aim and enshrined in national legislation with respect for the principle of proportionality;⁶⁶ requirement to prohibit actions aimed at discrimination and to promote the rights of individuals to be free from discrimination;⁶⁷ this requirement also includes the requirement according to which domestic legislation shall clearly define and prohibit indirect discrimination;⁶⁸ requirement to ensure the respect for the principle of equality in law, particularly through the achieving the objective (reasonable) justification of the differentiation;⁶⁹ in its judgments, the Court has repeatedly stressed that Article 14 of the Convention does not prohibit States from treating groups differently in order to correct “factual inequalities” between them; at the same time, a difference of treatment is discriminatory if it is not pursued for a legitimate aim or if there is not reasonable relationship of proportionality between the means employed and the aim sought to be realized.⁷⁰

8. Principle of transparency presupposes the existence of the following basic requirements: requirement to provide free access to information and/or official documents held by public authorities; it is expected that such a requirement will enable the public to scrutinize and form an opinion on any matters of public interest, including on the manner of functioning of public authorities in a democratic society;⁷¹ requirement to provide the instruments

⁶³ *Hornsby v Greece*, no 18357/91, § 40, ECHR 1997-II.

⁶⁴ *Burdov v Russia* (no 2), no 33509/04, §§ 65-68, ECHR 2009.

⁶⁵ *Refah Partisi (The Welfare Party) and Others v Turkey* [GC], nos 41340/98, 41342/98, 41343/98 and 41344/98, § 25, ECHR 2003-II.

⁶⁶ *Savez Crkava 'Rijec Zivota' and Others v Croatia*, no 7798/08, § 107, ECHR 2011.

⁶⁷ *D.H. and Others v The Czech Republic* [GC], no 57325/00, § 131, ECHR 2007.

⁶⁸ *Biao v Denmark* [GC], no 38590/10, § 103, 24 May 2016.

⁶⁹ *Orsus and Others v Croatia*, no 15766/03, § 149, ECHR 2010.

⁷⁰ *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria*, no 40825/98, § 96, ECHR 2008.

⁷¹ *Magyar Helsinki Bizottsag v Hungary* [GC], no 18030/11, §§ 139, 161, 8 November 2016.

of monitoring the political parties' financial activities for accountability, which is essential for the ensure public confidence in the political process;⁷² requirement to provide clear procedural guarantees in the processes related to electoral issues.⁷³

The suggested model of constructing the system of anti-backsliding RoL standards shows that although such systematization certainly could not aspire to the completeness, it would nevertheless provide an exemplary overview of what approach can be employed in defining the very idea of the concept under consideration. Admittedly, it is not pragmatically necessary to try to provide a comprehensive list of certain standards, since RoL's content structure is logically developed within new models of legal conflicts that are resolved by the Court. This assertion is also substantiated by the very fact that the Court may produce new RoL standards that arise within the accumulation of both legal facts and moral values via the modeling of a certain type of socio-legal relationships. Thus, the non-exhaustive character of the RoL as the principle of multifaceted nature is closely predetermined with the spirit of the Court's living approach to the interpretation of the Convention.

But apart from that, it is important to recognise that all anti-backsliding RoL standards that are produced by the ECtHR have no axiological hierarchy. As was mentioned earlier, from the epistemological point of view, suggested elements constitute a set of formal and substantive values.⁷⁴ The point is that identifying the elements of the RoL as of formal and substantive nature enables the construction of a specific scale of structural (organizational) units, rather than marking out two full-value classes. The reason for this lies in the fact that investigated concept relies heavily on a human-centered approach. What appears to be most important in this matter is the fact that both formal and substantial components stemmed from the principle's teleological purpose, that is, from the idea of protecting natural human rights and achieving the ideals of justice.⁷⁵

⁷² *Cumhuriyet Halk Partisi v Turkey*, no 19920/13, § 69, 26 July 2016.

⁷³ *Davydov and Others v Russia*, no 75947/11, §§ 284,287, 13 November 2017.

⁷⁴ Obviously, for the Western-oriented literature, the debates on the formal and substantial RoL elements are quite common. See, for instance, classical investigations: Adriaan Bedner, "An Elementary Approach to the Rule of Law." *Hague Journal on the Rule of Law* 2, no. 1 (2010): 56–63. doi:10.1017/S1876404510100037 or Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (In Florida)?" *Law and Philosophy* 21, no. 2 (2002): 138–48.

⁷⁵ It means that by its very nature, despite a variety of approaches to the RoL definition, all such approaches have a common denominator – the protection and development of natural human rights. See: Ricardo Gosalbo-Bono, "The Significance of the Rule of Law and Its Implications for the European Union and the United States," *University of Pittsburgh Law Review*, no 72(2) (2010): 271–272.

The only difference is that such elements may be oriented on different RoL ends about the legal concept. Notably, substantive components are focused on the content matter of the law; they thus reflect the internal characteristics of the legal system. In other words, they set qualitative, non-instrumental goals of the law. In contrast, formal elements are instrumental in their nature, since they are oriented on a form of measurement that is vital for the achievement of pre-defined ideological goals. Therefore, such elements represent external characteristics of the legal system, thus providing the functionality of the substantial ones. From this perspective, the instrumentality of the formal elements reveals itself within an established procedure that helps materialise the justification of already formulated substantive RoL elements.

IV. CONCLUDING REMARKS

The ECtHR plays a critical role in the fight against RoL backsliding. One of the ways in which the Court can help to fight against the backsliding of the RoL is the protection of fundamental rights: the ECtHR is responsible for protecting fundamental rights and freedoms, such as the right to a fair trial, freedom of expression, the right to privacy, etc. By upholding these rights, the Court can prevent the erosion of civil liberties and protect individuals from national government abuses of power.

This paper has attempted to conceptualise the RoL as an indirect object of the ECtHR's informal law-making function. First, it was seen that the essence of this principle lies primarily in the fact that its content continued to evolve normatively via the Court's interpretation activity. Viewed within this perspective, the ECtHR should be considered one of the most important international actors that can add its voice to the production of qualitatively new legal anti-backsliding standards for the investigated principle.

The emergence of such standards has been directly related to the particular Court's interpretation case. Further, such components are fixed and made material through a concrete judicial decision. In relation to national legal systems, these judgments can be used as the sources of soft law, as in their content they suggest argumentation regarding a certain RoL element or a new direction in understanding the whole idea of this principle.⁷⁶ Thus, a national legislator is able to analyse, systematise such interpretations and adapt them

⁷⁶ The best explanation of this was given by Guzman and Meyer, who have rightly pointed out that judgments delivered by international courts are binding for particular states to which they are addressed. In other cases, such decisions, primarily concepts developed in them, can be used by other national legal systems as the nonbinding and influential legal instrument. See: Andrew T. Guzman, and Timothy L. Meyer, "International

to the “normative needs” of a particular society. In this case, judicial law-making shall be treated as one of the instruments for the practical elaboration of the RoL.

Within this methodological approach, the RoL should be construed as a meta-legal principle that is complex in its nature. The absence of an exhaustive RoL definition in official legal documents paves the way for the Court to use kaleidoscopic methodological concepts and doctrines to identify the principle’s “teleological fortitude”. The latter is that the RoL being framed within a human rights context can be represented as a set of interrelated standards which are the output of the Court’s decision-making. To prove this assumption, I have tried to enhance existing approaches to the RoL elemental composition, outlining two basic structural levels – the elements and their requirements. The outlined doctrinal suggestion, together with the Court’s living instrument approach provided a basis for the categorization of the European RoL standards within a specific anti-backsliding “reference system”.

Having understood these two characteristics of the ECtHR’s role in expanding the RoL normative content will facilitate the conceptualization of this meta-legal principle within precise contours. But what is the future of the suggested approach? I believe such a vision will make enforcement of the common human rights values in European society as a whole inevitable. The aspiration of this research was not to delve into the issue of the wider “legal fate” of European RoL standards, but to provide an overview of doctrinal choice in the systematization of such standards, with an aim towards thinking about how to further implement them into particular national practices.

Against this backdrop, what we need, ultimately, is to think about the standards to be extracted and adopted in states’ legal systems. Particularly, the application of suggested findings can foster the process of legal norms socialization and their further diffusion into national legislation. After all, developing appropriate and justified mechanisms for the implementation of the anti-backsliding RoL standards is not of merely academic concern but also of practical importance.

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